***United States Court of Appeals***

***for the Second Circuit***

# EXHIBITS

74-1694

~~73-1345~~

# United States Court of Appeals
## FOR THE SECOND CIRCUIT

Docket No. 73-1345.

TITAN GROUP, INC.,

*Plaintiff-Appellee,*

*against*

HAROLD FAGGEN,

*Defendant-Appellant.*

UNITED STATES COURT OF APPEALS
FILED
AUG 15 1974
SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[redacted] EXHIBITS

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## INDEX TO APPENDIX.


| | Page |
|---|---|
| Relevant Docket Entries | 1a |
| Complaint | 4a |
| Exhibit I, Annexed to Complaint | 19a |
| Answer | 24a |
| Plaintiff's Reply | 38a |
| Defendant's Notice of Motion for Summary Judgment | 39a |
| Statement Under Rule 9(g) General Rules | 41a |
| Affidavit of Harold Faggen in Support of Defendant's Motion for Summary Judgment | 43a |
| Exhibit A, Annexed to Affidavit of Harold Faggen | 53a |
| Exhibit B, Annexed to Affidavit of Harold Faggen | 58a |
| Exhibit C, Annexed to Affidavit of Harold Faggen | 59a |
| Exhibit D, Annexed to Affidavit of Harold Faggen | 60a |
| Exhibit E, Annexed to Affidavit of Harold Faggen | 96a |
| Exhibit F, Annexed to Affidavit of Harold Faggen | 98a |
| Exhibit G, Annexed to Affidavit of Harold Faggen | 100a |
| Exhibit H, Annexed to Affidavit of Harold Faggen | 101a |
| Exhibit I, Annexed to Affidavit of Harold Faggen | 112a |
| Plaintiff's Notice of Cross-Motion | 113a |
| Affidavit of Edmund M. Kaufman in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment and for Injunction | 114a |

Page

Exhibit 1B, Annexed to Affidavit of Edmund M. Kaufman . . . . . 159a

Exhibit 2, Annexed to Affidavit of Edmund M. Kaufman . . . . . 161a

Exhibit 3, Annexed to Affidavit of Edmund M. Kaufman . . . . . 166a

Exhibit 4, Annexed to Affidavit of Edmund M. Kaufman . . . . . 168a

Exhibit 5A, Annexed to Affidavit of Edmund M. Kaufman . . . . . 178a

Exhibit 5B, Annexed to Affidavit of Edmund M. Kaufman . . . . . 183a

Exhibit 5C, Annexed to Affidavit of Edmund M. Kaufman . . . . . 188a

Exhibit 6A, Annexed to Affidavit of Edmund M. Kaufman . . . . . 189a

Exhibit 6B, Annexed to Affidavit of Edmund M. Kaufman . . . . . 198a

Exhibit 7, Annexed to Affidavit of Edmund M. Kaufman . . . . . 199a

Exhibit 8, Annexed to Affidavit of Edmund M. Kaufman . . . . . 205a

Exhibit 9A, Annexed to Affidavit of Edmund M. Kaufman . . . . . 206a

Page

Exhibit 9B, Annexed to Affidavit of Edmund M. Kaufman . . . . . 208a

Exhibit 10, Annexed to Affidavit of Edmund M. Kaufman . . . . . 209a

Exhibit 11, Annexed to Affidavit of Edmund M. Kaufman . . . . . 211a

Exhibit 12, Annexed to Affidavit of Edmund M. Kaufman . . . . . 214a

Affidavit of Daniel G. Hatcher, Jr. in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment and Injunction . . . . 215a

Exhibit A, Annexed to Affidavit of Daniel G. Hatcher, Jr. . . . . 248a

Exhibit B, Annexed to Affidavit of Daniel G. Hatcher, Jr. . . . . 250a

Exhibit C, Annexed to Affidavit of Daniel G. Hatcher, Jr. . . . . 252a

Exhibit D, Annexed to Affidavit of Daniel G. Hatcher, Jr. . . . . 253a

Exhibit E, Annexed to Affidavit of Daniel G. Hatcher, Jr. . . . . 256a

Exhibit F, Annexed to Affidavit of Daniel G. Hatcher, Jr. . . . . 261a

Page

Exhibit G, Annexed to Affidavit of Daniel G. Hatcher, Jr. . . . . 264a

Affidavit of Anthony M. Frank in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment and Injunction . . . . 267a

Exhibit 1, Annexed to Affidavit of Anthony M. Frank . . . . . 279a

Affidavit of Robert James Frankel in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defemdant's Motion for Summary Judgment and Injunctiɔn . . . . 281a

Exhibit 1, Annexed to Affidavit of Robert James Frankel . . . . . 308a

Exhibit 2, Annexed to Affidavit of Robert James Frankel . . . . . 310a

Exhibit 3, Annexed to Affidavit of Robert James Frankel . . . . . 311a

Exhibit 4, Annexed to Affidavit of Robert James Frankel . . . . . 312a

Exhibit 5, Annexed to Affidavit of Robert James Frankel . . . . . 313a

Page

Exhibit 6, Annexed to Affidavit of Robert James Frankel . . . . . 314a

Exhibit 6A, Annexed to Affidavit of Robert James Frankel . . . . . 317a

Exhibit 7, Annexed to Affidavit of Robert James Frankel . . . . . 318a

Exhibit 8, Annexed to Affidavit of Robert James Frankel . . . . . 319a

Exhibit 9, Annexed to Affidavit of Robert James Frankel . . . . . 325a

Exhibit 10, Annexed to Affidavit of Robert James Frankel . . . . . 326a

Exhibit 11, Annexed to Affidavit of Robert James Frankel . . . . . 328a

Exhibit 12, Annexed to Affidavit of Robert James Frankel . . . . . 330a

Exhibit 13, Annexed to Affidavit of Robert James Frankel . . . . . 334a

Reply Affidavit of Richard K. McIntyre in Support of Defendant's Motion . . . . . 336a

Exhibit A, Annexed to Reply Affidavit of Richard K. McIntyre . . . . . 348a

Page

Reply Affidavit of Harold Faggen in Support of Defendant's Motion . . . . . 350a

Exhibit J, Annexed to Reply Affidavit of Harold Faggen . . . . . 393a

Exhibit K, Annexed to Reply Affidavit of Harold Faggen . . . . . 394a

Exhibit L, Annexed to Reply Affidavit of Harold Faggen . . . . . 398a

Exhibit M, Annexed to Reply Affidavit of Harold Faggen . . . . . 399a

Exhibit N, Annexed to Reply Affidavit of Harold Faggen . . . . . 422a

Exhibit O, Annexed to Reply Affidavit of Harold Faggen . . . . . 424a

Exhibit P, Annexed to Reply Affidavit of Harold Faggen . . . . . 437a

Exhibit Q, Annexed to Reply Affidavit of Harold Faggen . . . . . 466a

Exhibit R, Annexed to Reply Affidavit of Harold Faggen . . . . . 468a

Appendix A, Annexed to Reply Affidavit of Harold Faggen . . . . . 470a

Appendix B, Annexed to Reply Affidavit of Harold Faggen . . . . . 471a

Page

Reply Affidavit of Edmund M. Kaufman in Support of Plaintiff's Motion . . . . . 489a

Reply Affidavit of Anthony M. Frank in Support of Plaintiff's Motion . . . . . 502a

Reply Affidavit of Daniel G. Hatcher in Support of Plaintiff's Motion . . . . . 508a

Exhibit 1, Annexed to Reply Affidavit of Daniel B. Hatcher . . . . . 514a

Exhibit 2, Annexed to Reply Affidavit of Daniel B. Hatcher . . . . . 517a

Exhibit 3, Annexed to Reply Affidavit of Daniel B. Hatcher . . . . . 519a

Exhibit 4, Annexed to Reply Affidavit of Daniel B. Hatcher . . . . . 520a

Exhibit 5, Annexed to Reply Affidavit of Daniel B. Hatcher . . . . . 521a

Affidavit of J. Vincent Russo in Support of Plaintiff's Motion . . . . . 522a

Statement Under Rule 9(g) General Rules . . . 525a

Endorsement Denying Motion for Summary Judgment and Injunction Dated January 12, 1973 by Sylvester J. Ryan, U.S.D.J. . . . . 530a

Memorandum of Judge Richard H. Levet . . . . 531a

Memorandum From Sylvester J. Ryan, U.S.D.J. . . 532a

Page

Defendant's Order to Show Cause for a Rehearing of the Denial of the Motion for a Preliminary Injunction Dated January 29, 1973 . 533a

Affidavit of Harold Faggen in Support of Defendant's Motion for Rehearing . . . . . 534a

Exhibit, Annexed to Affidavit of Harold Faggen . 537a

Plaintiff's Notice of Cross-Motion to Amend Complaint to Add Additional Claims for Relief . 538a

Affidavit of Robert James Frankel (1) in Opposition to Motion to Compel *Pendente Lite* Interest Payments, and (2) in Support of Motion to Amend Complaint to Add Additional Claims for Relief . . . . . 539a

Proposed First Amendment to Complaint . . . 557a

Reply Affidavit of Harold Faggen . . . . . 566a

Notice of Appeal . . . . . 579a

Order to Show Cause for a Rehearing . . . . 580a

Memorandum Endorsed Denying Defendant's Motion for Rehearing for a Preliminary Injunction . 581a

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

Docket No. 73 - 1345.

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TITAN GROUP, Inc.,

*Plaintiff-Appellee,*

*against*

HAROLD FAGGEN,

*Defendant-Appellant.*

On Appeal From the United States District Court for the Southern District of New York.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -X

RELEVANT DOCKET ENTRIES.

5- 2-72 Filed Complaint. Issued Summons.

6- 2-72 Filed Dft. Interrogs. to Pltff. First Set.

6- 2-72 Filed Answer. Dft. Demands Trial by jury.

6-12-72 Filed Notice of Motion. Re: Summary Judgment ret. 6/20/72.

8- 1-72 Filed summons with marshal's ret. Served Harold Faggen by Jennie Rodriguez on 5/11/72.

9-12-72 Filed pltff's affidavits & notice of motion summary judgment ret., 9-26-72.

RELEVANT DOCKET ENTRIES

1-12-73 Filed memo-endorsed on deft's motion filed 6-12-72 summary judgment: This motion for summary judgment is denied. After extensive oral argument, I have concluded that there are issues which must be decided at trial. I also have concluded that this case should be tried as soon as possible & this, in accordance with the memorandum of December 20, 1972 from Judge Levet to Chief Judge Edelstein. I assign this case for trial to Judge Levet. So ordered. Ryan, J.

1-12-73 Filed memo-endorsed on pltff's motion for summary judgment filed 9-12-72: same endorsement as entered on deft's motion filed on 6-12-72 for summary judgment.

1-12-73 Filed deft's notice for a trial by jury of the issues raised by deft's counterclaim & pltff's reply thereto.

1-22-73 Filed pltff's replys to deft's counterclaims.

1-29-73 Filed def's affidavit & show cause order ret. before Ryan, J. on 1-30-73 at 9:00 A.M. RM. 2203. RE: Promissory notes.

RELEVANT DOCKET ENTRIES

2-5-73 Filed pltff's affidavit & notice of cross-motion before Ryan, J. on 2-8-73 to amend complaint.

2-8-73 Filed deft's notice of appeal to the USCA from the order entered on 1-12-73 denying deft's motion for a mandatory injunction. Mailed copy to Powers & Gross.

2-8-73 Filed undertaking for costs on appeal in the sum of $250.00 by the Fireman's Fund, National Surety Corp.

COMPLAINT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -X

TITAN GROUP, Inc.,

*Plaintiff,*

*against*

HAROLD FAGGEN,

*Defendant.*

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -X

Plaintiff, by its attorneys, Powers and Gross, for its verified complaint against the defendants, alleges as follows:

*Jurisdiction*

1 - This action arises from securities fraud as a result of a transaction closed on December 2, 1968 for the acquisition by plaintiff, Titan Group, Inc. (hereinafter called "Titan"), of the capital stock of four affiliated corporations owned by the defendant Harold Faggen. These corporations consisted of Harold Faggen Associates, Inc., Actuarial Tabulating Corp., Employee Fund Services Corp. and Fund S & E Corp. (hereinafter

collectively called the "Faggen Companies"), all of whose issued and outstanding capital stock was owned by defendant Faggen. Plaintiff Titan paid an aggregate of $5,500,000 principal amount of 4% Convertible Installment Notes due 1978, and $42,440 in cash and other notes, in exchange for all of the capital stock of the Faggen Companies, and an employment contract with defendant Faggen, based upon misrepresentations of material facts and omissions of material facts hereinafter specified. Said misrepresentations and omissions were part of a scheme to defraud Titan, which was in violation of the Securities Exchange Act of 1934, Section 10(b) thereof (15 U.S.C. 78(j)) and Rule 10b-5 (17 C.F.R. 240, 106-5) promulgated by the Securities and Exchange Commission thereunder, and in further violation of the securities laws of New York.

2 - This Court has jurisdiction of this action under Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78(aa)).

3 - The jurisdiction of this Court is further based upon diversity of citizenship in that:

(a) Titan is a publicly-owned corporation organized and existing under the laws of Delaware, and maintains

its principal executive offices at 222 Executive Park, Louisville, Kentucky.

(b) The defendant Faggen is a citizen of the State of New York, and

(c) The amount in controversy, exclusive of interest and costs, exceeds $10,000.

FIRST CAUSE OF ACTION

4 - As of December 2, 1968, Titan acquired all of the issued and outstanding stock of the Faggen Companies in a joint transaction under which an aggregate of $5,500,000 in 4% Convertible Installment Notes due November 1, 1978 (hereinafter called the "Notes") and $42,440 in cash and other notes were transferred to the defendant Faggen, with the following principal amounts of the Notes paid for the respective Faggen Companies:

| Company | Principal Amount of Notes |
|---|---|
| Harold Faggen Associates, Inc. | $3,960,000 |
| Actuarial Tabulating Corp. | 1,000,000 |
| Employee Fund Services Corp. | 500,000 |
| Fund S & E Corp. | 40,000 |
| TOTAL | $5,500,000 |

Payments of the principal of the Notes commence on November 1, 1974.

(a) Defendant Faggen has transferred a minor portion of the Notes to certain relatives and associates, but upon information and belief, has continued to effectively own and control all of the Notes and any rights arising thereunder.

(b) Titan has, since the issuance of the above described securities, paid all notes which became due, made all interest payments accruing thereon, and has performed or complied with all of the terms and provisions of such securities and the underlying contracts relating to their issuance.

5 - In order to induce Titan to issue the foregoing described securities to defendant Faggen, Faggen caused to be prepared a selling memorandum on the Faggen Companies containing a statement of "Net Income - Pre-Tax" preceding the date of acquisition by Titan, adjusted to the accounting conditions (accrued basis) which would prevail after the acquisition of the Faggen Companies.

(a) A copy of such selling memorandum is annexed hereto as Exhibit I, and the statement of historical "Net Income - Pre-Tax" is contained on the fourth page

(denominated Exhibit A) of such memorandum, showing an aggregate "Net Income - Pre-Tax" of the Faggen Companies of $571,262 for 1968, $451,885 for 1967, $490,754 for 1966 and $380,802 for 1965.

(b) Said memorandum represents "As shown in Exhibit A attached, net profit before tax has been growing at a compound rate of approximately 15 percent a year" (Exhibit I, page 3).

6 - Plaintiff Titan is informed and believes that the Faggen Companies did not earn the amounts stated in the selling memorandum for the years listed therein, did not grow at the represented "rate of approximately 15 percent a year", and that the "Net Income - Pre-Tax" of the Faggen Companies was substantially and materially less than the amounts shown in the selling memorandum for each of the years stated.

7 - Plaintiff is informed and believes that the "Net Income - Pre-Tax" of the Faggen Companies was overstated to the following extent:

| Year | Represented Net Income | Actual Income (Approximate) | Overstatement (Approximate) | Percentage Overstatement |
|---|---|---|---|---|
| 1965 | $380,802 | $297,000 | $ 84,000 | 28% |
| 1966 | 490,754 | 328,000 | 163,000 | 49% |
| 1967 | 451,885 | 254,000 | 198,000 | 78% |
| 1968 | 571,262 | 442,000 | 129,000 | 29% |

8 - Rather than growing at the represented rate of 15 percent a year, the actual net income of the Faggen Companies fell substantially between 1966 and 1967, was not growing at the represented rate and was erratic and undependable in nature.

9 - The management and members of the Board of Directors of Titan received a copy of such selling memorandum prepared by the defendant Faggen prior to issuing the Notes, cash and other notes in exchange for the capital stock of the Faggen Companies, and relied upon such memorandum in setting the price for the Faggen Companies, i. e. capitalizing the misrepresented 1968 pre-tax earnings of $571,262 at an approximate multiple of 10 times, and issuing $5,500,000 principal amount of the Notes and $42,440 in cash and other notes, in payment for the misrepresented earning power of the Faggen Companies.

10 - Since the date of the acquisition of the Faggen Companies, their "Net Income - Pre-Tax" has never attained

the level represented for 1968, or for any of the prior years, and the pre-tax income of the Faggen Companies has been barely sufficient to cover the annual interest burden of $220,000 paid on the Notes.

11 - The net asset value of the Faggen Companies was, as of the date of acquisition, no more than approximately $1,200,000 and as a direct result of the false and misleading selling memorandum relied upon by Titan, Titan has paid excess consideration of approximately $4,350,000 in valuable securities and cash, has made approximately $660,000 in interest payments, and has paid defendant Faggen approximately $175,000 in wages under an employment agreement entered into as part of the joint transaction described above, and also paid substantial home office overhead for the Faggen Companies.

12 - Defendant Faggen knowingly prepared the false and misleading selling memorandum, and his actions constituted and included (i) the making to Titan of misrepresentations, and material omissions, as to material facts, (ii) the engaging in devices, schemes and artifices to defraud, and (iii) the engaging in transactions, practices and a course of business which operated as a fraud and deceit upon Titan.

13 - The defendant, directly or indirectly, by means of instruments of interstate transportation or communication in interstate commerce and of the mails, induced Titan to pay him monies and to issue the Notes, in exchange for the capital stock of the Faggen Companies, all in violation of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, and the laws of New York.

*Need for Equitable Relief*

14 - As a result of the wrongful and deceptive acts of the defendants, plaintiff Titan is entitled to have the above described transaction rescinded, and to have returned to it, all consideration in cash and securities paid to the defendant Faggen in connection therewith.

15 - Titan hereby tenders to the defendant Faggen the return of all the capital stock of the Faggen Companies, against the return to Titan of the Notes, interest payments received thereon by Faggen to date and all sums received by Faggen under his employment agreement given in connection with such transaction.

16 - The business and affairs of the Faggen Companies have been maintained separate and apart from the

business of Titan, all of the books and records of the Faggen Companies are separate and in the possession of the defendant Faggen, as are its accounts, properties and other operating assets, which can be readily identified and returned in full, with cash adjustments for loans to and withdrawals from the Faggan Companies.

17 - Unless Faggen and his associates are enjoined during the pendency of this action from selling, pledging or otherwise transferring the Notes, the relief prayed for herein will become a nullity before this Court can hear or determine the cause of action, and Titan will suffer irreparable injury. Plaintiff Titan has no adequate remedy at law.

SECOND CAUSE OF ACTION

18 - Titan repeats and realleges the allegations contained in paragraphs 1 through 17 of the First Cause of Action, as though incorporated in full herein.

19 - In an attempt to determine the precise amounts by which the "Net Income - Pre-Tax" for the years 1968, 1967, 1966 and 1965 was overstated by the defendant in his selling memorandum, Titan attempted to obtain the original books and records of the Faggen Companies for

the period 1965 through 1968, and for the succeeding calendar year 1969, consisting of the general ledger, accounting work sheets, and other financial data necessary to reconstruct the "Net Income - Pre-Tax" of the Faggen Companies, in accordance with generally accepted accounting principles, for the period prior to their acquisition by Titan. As sole stockholder of the Faggen Companies, Titan is entitled to possession of all such books and records.

20 - Notwithstanding oral and written demand made upon the defendant and his agents, who continue to have dominion and control over its corporate records, the defendant has caused his former employees and other agents to refuse to make such material freely available to Titan. Titan has been able to reconstruct such net income for prior periods only from partial records recently obtained from defendant Faggen.

21 - Under the provisions of the related agreements of sale by which the Faggen Companies were acquired by Titan, and specifically under paragraph 4.2 of each of the agreements, each bearing the date December 2, 1968, the defendant Faggen, as seller of all the capital stock of each Faggen Company covenanted and agreed as follows:

"Seller will, upon request, do such other and further acts as may be necessary in the opinion of Titan's counsel * * * to protect the property of the Company, to aid in the prosecution and defense of other litigation or proceedings in connection with the business of the Company prior to the date hereon [December 2, 1968], all without further consideration but at the expense of the Company. The Seller [defendant Faggen] agrees to cooperate and to use Seller's best efforts to have the * * * other employees of the Company cooperate with Titan at its request and expense after the date hereof in endeavoring to effect the collection of all receivables and other items owing to the Company * * * and in connection with any other actions, proceedings, arrangements or disputes involving the Company and/or Titan based upon contracts, arrangements or acts of the companies which were in effect or occurred on or prior to the date hereof." (Insertions supplied.)

22 - In addition to violating Titan's rights as sole stockholder under applicable state law, the defendant Faggen has breached the foregoing express covenant contained in each of the four agreements for acquisition of the Faggen Companies, in that he has failed and refused to cause the above described financial information to be furnished in full to Titan. Upon information and belief, Faggen has further instructed his accountant, Joseph Warren, who has possession of substantial portions of such information, to withhold such information from Titan, notwithstanding Warren's continued employment as the accountant for the Faggen Companies, prior to and since their acquisition by Titan.

23 - The foregoing violations of Titan's rights as sole stockholder and of the contracts for the acquisition of the Faggen Companies also constitutes a further violation by the defendant of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, in that the continuing concealment of material facts represents a continuation of the scheme to defraud Titan, alleged in the First Cause of Action of this Complaint.

24 - Unless the defendant is required by court order to surrender and transfer or cause the transfer of the above described records and financial information, the plaintiff Titan will be irreparably injured and will be unable to adequately reconstruct its certified corporate financial statements for prior periods in compliance with its disclosure obligations under the federal securities laws. Plaintiff Titan has no adequate remedy at law.

25 - Titan has incurred and will continue to incur substantial accounting and legal fees as additional money damages resulting from the scheme to defraud hereinabove alleged, aggregating at least to $100,000.

WHEREFORE, plaintiff respectfully requests the following relief:

(a) That Titan have an Order of Rescission against defendant Faggen requiring him and associates under his control to deliver for cancellation $5,500,000 principal amount of 4% Convertible Installment Notes due 1978, together with all interest payments received to date thereon, $42,440 in cash received and all salary received by Faggen under his employment contract and reimbursement of home office overhead incurred by Titan, against the

return to defendant Faggen of all of the issued and outstanding capital stock of the Faggen Companies and their approximately $1,200,000 in operating and net cash assets adjusted as of December 2, 1968, with interest on the cash retained by defendant Faggen since 1968 at the rate of 7 1/4% per annum from the date of each payment thereof; or in the alternative, that Titan have an award in damages for all losses suffered in the aforesaid transaction with Faggen;

(b) That defendant Faggen be required to promptly surrender, or cause to be surrendered, to Titan all of the books, memoranda, working papers and other financial and accounting data of the Faggen Companies for the years 1969, 1968, 1967, 1966 and 1965 not heretofore surrendered to Titan;

(c) That an order be entered enjoining the defendant Faggen from seeking to accelerate the maturity of or enforce or collect upon any of the 4% Convertible Installment Notes due 1978 of Titan held by him and his associates, and enjoining him and his associates from selling, pledging or otherwise transferring such Notes, pending the hearing and disposition of this action;

COMPLAINT

(d) Damages be assessed against the defendant Faggen for all of the accounting and legal expenses heretofore or hereafter indurred by Titan, and any other supplementary money damages suffered in connection with the scheme to defraud set forth in the complaint, and the continuing concealment of the material facts thereof;

(e) An order awarding such other and further relief to the plaintiff as shall be just and proper in the premises.

Dated: April 27, 1972

POWERS AND GROSS

By LAWRENCE M. POWERS, ESQ.
Attorneys for Plaintiff

(Verified by Robert James Frankel, April 26, 1972.)

EXHIBIT I, ANNEXED TO COMPLAINT.

(Confidential) To A. Frank

(Illegible)

Harold Faggen Associates, Inc. was organized in 1956 to take over the business started by Harold Faggen during the latter part of 1946.

Harold Faggen Associates, Inc. and several related organizations function primarily as consulting actuaries to multi-employer pension funds, welfare funds, supplemental unemployment funds, etc.

As shown in Exhibit B, attached there are 143 clients, most of which have been clients continuously for more than ten years.

The staff consists of 33 persons and is being expended as rapidly as competent experienced persons can be found. The stability of the staff is demonstrated by the fact that only seven employees have been on the staff for five years or less. Sixteen employees have been on the staff for ten years or longer.

The Corporations occupy the ninth floor of a fire proof building at 853 Broadway. The floor contains approximately 6,000 net feet. It is expected that an additional 3,000 square feet on the eighth floor will be occupied within the near future. The space on the eighth floor is vacant and a lease is being negotiated.

EXHIBIT I

Harold Faggen Associates, Inc. owns a number of pieces of IBM unit record equipment and leases an IBM 360 Model 20 Computer. The present system uses cards but two disc drives are on order and delivery is expected within the next few weeks.

Since we are in constant touch with many trade unions, we have undertaken the task of programming a completely automated union office. A very substantial client has already been obtained and we expect the fees from this client to be sufficient to pay all development costs.

Since we have both actuarial and computer capacity, we are in the process of programming completely automated pension plan calculations for small and medium size employers. We expect to provide these services to stock brokers, accountants and lawyers only. The availability of packaged pension plan services at very reasonable prices will enable stock brokers to service the pension plans instead of leaving them for the insurance companies. It will also be possible for the thousands of accounting firms throughout the country to service their clients with pension fund advice as the Ostheimer Division of Peat, Marwick, Mitchell services their clients.

EXHIBIT I

The profit potential interest in our operation makes it possible for us to achieve any reasonable goal we set, while, at the same time, absorbing the additional costs involved in developing new programs. As shown in Exhibit A attached, net profit before tax has been growing at a compound rate of approximately 15 percent a year.

EXHIBIT I

(EXHIBIT A)

Net Income - Pre-Tax
Adjusted to basis which will
prevail after acquisition

(excludes investment income)

| | Fiscal Years Ending In: | | | |
|---|---|---|---|---|
| | 1965 | 1966 | 1967 | 1968 |
| Harold Faggen Associates, Inc. (June 30) | $253,357 | $367,087 | $332,192 | $430,506 |
| Actuarial Tabulating Corp. (March 31) | 59,878 | 60,976 | 59,201 | 65,806 |
| Employee Fund Services Corp. (Sept. 30) | 32,767 | 27,891 | 25,252 | 29,104 |
| Fund S & E Corp. (June 30) | ——— | ——— | ——— | 10,476 |
| Harold Faggen, Personal (Dec. 31) | 34,800 | 34,800 | 35,240 | 35,280 |
| Totals | $380,802 | $490,754 | $451,885 | $571,262 |

EXHIBIT I

| | Pons | Wolff | Otis | Total |
|---|---|---|---|---|
| Born in 1908 | 2 | | 2 | 4 |
| " " 1907 | 3 | 1 | 3 | 7 |
| 1966 | 5 | 1 | 1 | 7 |
| " " 1965 | — | 1 | 1 | 2 |
| " 1960-64 | 19 | 14 | 2 | 35 |
| Prior to 1960 | 49 | 36 | 3 | 88 |
| Total | 78 | 53 | 12 | 143 |

ANSWER.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Defendant, by his attorneys, Sheib, Shatzkin & Cooper, for his answer:

JURISDICTION

1. Denies each and every allegation contained in paragraph 1, except admits that pursuant to contracts executed on or about December 2, 1968 plaintiff acquired the capital stock of four corporations (described in the complaint as the "Faggen Companies") owned by defendant individually or as trustee and defendant's promissory note for $42,400, in exchange for which plaintiff delivered to defendant convertible installment promissory notes in the aggregate principal sum of $5,500,000 bearing interest at 4% per annum, $40.00 in cash and a note in the principal sum of $42,400, and that simultaneously therewith the plaintiff entered into an employment contract with defendant.

2. Denies each and every allegation contained in paragraph 2.

ANSWER

AS TO THE FIRST CAUSE OF ACTION

3. Denies each and every allegation contained in paragraph 4, except admits that $40.00 in cash, a promissory note in the face amount of $42,400 and convertible 4% notes whose principal face amounts aggregated $5,500,000 were delivered to defendant on or about December 2, 1968 with the following principal amounts of promissory notes delivered in consideration for the respective Faggen Companies:

| Company | Principal Amount of Notes |
|---|---|
| Harold Faggen Associates, Inc. | $3,960,000 |
| Actuarial Tabulating Corp. | 1,000,000 |
| Employee Fund Services Corp. | 500,000 |
| Fund S & E Corp. | 40,000 |

Reference is made to the said notes for the provision as to when principal is payable.

4. Denies each and every allegation contained in paragraph 5, except admits that in or about the first week in October 1968 defendant delivered to plaintiff a hand-written memorandum; Exhibit 1 of the complaint purports to be a true copy of said memorandum but contains

variations therefrom and defendant respectfully refers to the memorandum for its contents.

5. As to the allegations in paragraphs 6, 7 and 8, defendant respectfully refers to the memorandum referred to in paragraph 4 hereof for the statements contained therein and affirmatively alleges that all of the statements contained in said memorandum were true and correct in all material respects and in all other respects denies each and every allegation in paragraphs 6, 7 and 8.

6. Denies each and every allegation in paragraph 9, except denies that he has knowledge or information sufficient to form a belief as to whether management and members of the Board of Directors of plaintiff received a copy of the memorandum referred to in paragraph 4 above.

7. With respect to the allegations contained in paragraph 10, the defendant respectfully refers to the financial records of the Faggen Companies to determine the pre-tax income in the periods following the acquisition by plaintiff and respectfully refers to Exhibit B annexed to each of the contracts entered into on December 2, 1968 for any representation made by the defendant as to the income of the Faggen Companies and in all other respects denies each and every allegation in paragraph 10.

ANSWER

8. Denies each and every allegation in paragraph 11, except admits that plaintiff paid approximately $660,000 in interest and that defendant received approximately $175,000 pursuant to an employment contract and affirmatively alleges that the said $175,000 was paid by the Faggen Companies.

9. Denies each and every allegation in paragraphs 12 through 17 inclusive.

AS TO THE SECOND CAUSE OF ACTION

10. With respect to the allegations contained in paragraph 18 of the complaint, repeats and realleges each allegation, admission and denial in response to paragraphs 1 through 17 of the first cause of action.

11. Denies each and every allegation contained in paragraph 19, except admits that plaintiff is entitled to possession of the books and records of the Faggen Companies and affirmatively alleges that the plaintiff has been in possession of such books and records for more than three years.

12. Denies each and every allegation contained in paragraphs 20 and 22 through 25 inclusive.

ANSWER

FIRST DEFENSE

13. The complaint and each cause of action contained therein fail to state a claim upon which relief can be granted.

SECOND DEFENSE

14. The Faggen Companies were acquired by plaintiff pursuant to four separate written agreements of sale dated the 2nd day of December 1968.

15. Each said agreement provides that the liability of the defendant to the plaintiff for any damage or deficiency resulting from any misrepresentation or breach of warranty or from any misrepresentation or omission from any certificate or other instrument furnished to the plaintiff would completely terminate on March 31, 1970 unless notice of any claim, demand, action, suit or proceeding was given to the defendant prior thereto; except for income tax or other tax liabilities relating to the operations of the Faggen Companies prior to October 1, 1968 in excess of reserves provided in the financial statements of the Faggen Companies.

16. No notice of the claim, demand, action or the within suit or proceeding was given to the defendant prior to March 31, 1970.

17. This action is barred by the aforesaid provisions of the aforesaid contracts.

THIRD DEFENSE

18. The first cause of action purports to be based upon the Securities Exchange Act of 1934, Section 10(b) thereof [15 USC 78(j)] and Rule 10(b)-7 (17 CFR 240.10b-5) and upon the securities laws of New York.

19. Pursuant to Section 214 of the Civil Practice Law and Rules of the State of New York, an action to recover upon a liability, penalty or forfeiture created or imposed by statute must be commenced within three years.

20. The acts complained of the defendant alleged in the complaint took place prior to December 2, 1968 and this action was not commended until May 2, 1972, more than three years thereafter and is barred by the applicable Statute of Limitations.

ANSWER

FOURTH DEFENSE

21. (a) Annexed to the contracts dated December 2, 1968 by which plaintiff acquired the Faggen Companies, there were copies of Federal income tax returns of the Faggen Companies showing the net income of each of said companies for the fiscal years ending in 1965 to 1968 inclusive.

(b) Following the closing of the transactions complained of and in or about the period from December 1968 through March 1969, plaintiff caused an examination and review of the books and records to be conducted by accountants in plaintiff's employ.

(c) In each year following the closing of the transactions of which plaintiff complains, independent auditors retained by the plaintiff reviewed the books and records of the Faggen Companies.

(d) Since December 2, 1968, plaintiff has had access to and possession of all of the books and records of the Faggen Companies.

(e) Since December 2, 1968, plaintiff has controlled the Faggen Companies and directed the business affairs of said companies.

ANSWER

22. By virtue of the foregoing, plaintiff has had notice of all material facts concerning the financial condition of the Faggen Companies and the earnings thereof since not later than March 1969 and, notwithstanding such notice, refrained from commencing this action until May 2, 1972 and is thereby guilty of such laches as should in equity bar it from maintaining this action.

FIFTH DEFENSE

23. Defendant repeats and realleges the allegations contained in paragraph 21 hereof.

24. By virtue of the foregoing, plaintiff has ratified contracts dated December 2, 1968 by which it acquired the Faggen Companies and has waived its right to any damages.

SIXTH DEFENSE

25. Defendant repeats and realleges the allegations contained in paragraph 21.

26. The acquisition of said Faggen Companies by plaintiff resulted in the plaintiff acquiring the investment portfolio of said companies having a fair market value of approximately $1,300,000. Since the date of

acquisition, the plaintiff has disposed of said investment portfolio and has made use of the same for its own benefit. In addition, subsequent to acquisition, plaintiff took from the Faggen Companies sums aggregating approximately $935,000.

27. At no time prior to the commencement of this action did plaintiff contend that the acquisition was fraudulently induced.

28. On or about March 25, 1970, in connection with a transaction whereby $1,500,000 of plaintiff's 4% convertible installment notes previously issued to defendant were transferred into escrow to secure obligations of the defendant to Clara Faggen, plaintiff represented that said notes were valid and outstanding obligations of the plaintiff.

29. By the acts and conduct hereinabove described, the plaintiff is estopped from bringing this action.

SEVENTH DEFENSE

30. Defendant repeats and realleges the allegations contained in paragraph 21 hereof.

31. Since not later than March 1969, plaintiff has had full knowledge of all the facts upon which it now

claims the right to rescind the transaction of which it complains and plaintiff has elected not to rescind said transaction or to tender the defendant the stock in the Faggen Companies until the commencement of this action.

32. By reason of the premises and failure of plaintiff to make an election to rescind its purchase and to tender the stock prior to the commencement of this action, plaintiff has elected to and has ratified and affirmed the purchase of the stock of the Faggen Companies and cannot now maintain this action.

EIGHTH DEFENSE

33. Since on or about December 2, 1968, plaintiff has had full access to all the facts as to which it claims fraud and misrepresentation.

34. Plaintiff did not elect to rescind the transactions of which it complains until the commencement of this action; by reason of such delay, plaintiff has elected to affirm the said transactions and cannot now maintain this action.

ANSWER

NINTH DEFENSE

35. Plaintiff is not entitled to equitable relief because it failed to come into this Court with clean hands.

TENTH DEFENSE AND FIRST COUNTERCLAIM

36. On or about December 2, 1968, a series of forty-seven (47) convertible subordinated promissory notes in the principal amount of $5,500,000 were issued and delivered to defendant by plaintiff in consideration for the transfer of the capital stock of the four Faggen Companies. Twenty (20%) percent of the original face amount of each note was payable on November 1, 1974 and twenty (20%) percent each year thereafter until November 1, 1978 when the balance of the original face amount of the notes was to be paid.

37. The notes provide that interest is payable semi-annually on May 1 and November 1 of each year until the principal shall have become due and payable.

38. The notes further provide the following:

> "1(d) In the event of a default in the payment of any installment of interest or principal hereunder which continues for fifteen

(15) days after written notice hereof to the Company, then, at the option of the holder of any note in the series in which this note is one, all of the notes in such series shall immediately become due and payable."

39. Defendant is and at all relevant times has been a holder of notes in the series referred to in paragraph 38 hereof.

40. Plaintiff defaulted in the payment of the interest due on May 1, 1972 on each of the aforesaid notes.

41. On or about May 2, 1972, defendant gave plaintiff written notice of said default.

42. The default of the plaintiff in the payment of the aforesaid interest has continued for a period of more than fifteen (15) days since the date of said written notice and therefore all of the notes have now become due and payable.

43. Plaintiff has failed and refused to make payment of the principal due on said notes.

44. Said notes provide that in the event legal action becomes necessary to enforce the terms and conditions of the note, the losing party in such legal action

shall pay all the incidental costs and reasonable attorneys' fees incurred by the prevailing party.

45. Said notes provide that the plaintiff shall pay interest at the rate of seven (7%) percent per annum on any overdue principal and on any overdue interest.

SECOND COUNTERCLAIM

46. Plaintiff's claims are frivolous and plaintiff knows them to be frivolous.

47. This action has been brought for the purpose of coercing defendant to surrender rights under promissory notes issued to him and to others in 1968.

48. By reason of the foregoing, plaintiff should pay to the defendant all reasonable legal fees incurred in connection with the defense of this action.

Wherefore, defendant demands judgment dismissing the complaint with costs, and

On the First Counterclaim:

Declaring the principal sum of all of the promissory notes issued by the plaintiff in the aggregate principal sum of $5,500,000 due and payable together with interest at the rate of 7% per annum on the overdue principal and overdue interest and awarding judgment for

such amount and for all incidental costs and reasonable attorneys' fees incurred in connection with the collection of said notes and assertion of the first counterclaim and prosecution, and

On the Second Counterclaim:

Awarding to defendant judgment for the attorneys' fees and other expenses incurred in the defense of the action brought by the plaintiff.

SHEIB, SHATZKIN & COOPER

By /s/ EDWARD LABATON
A Member of the firm
Attorneys for Defendant

PLAINTIFF'S REPLY.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Plaintiff, by its attorneys, Powers and Gross, hereby replies to the defendant's Counterclaims:

1. Plaintiff denies all the material allegations contained in paragraphs 13 through 35 of the defendant's Answer, constituting defendant's First through Ninth Defenses to the Complaint.

2. Plaintiff denies the allegations contained in paragraphs 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48, setting forth defendant's Tenth Defense and First and Second Counterclaims.

3. Plaintiff admits the allegations contained in paragraph 36, except that the described transaction was dated as of October 1, 1968, and admits the allegations contained in paragraphs 37 and 38.

WHEREFORE, plaintiff demands judgment dismissing the First and Second Counterclaims with costs, and the award of attorneys' fees and other expenses to plaintiff in connection with the defense thereof.

Dated: New York, New York
December 6, 1972

POWERS AND GROSS
By LAWRENCE M. POWERS, ESQ.
Attorneys for Plaintiff

DEFENDANT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Harold Faggen, sworn to on June 7, 1972 and the exhibits attached thereto, and upon all of the proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held in Room 506, United States Courthouse, Foley Square, New York, N. Y. on June 20, 1972 at 10:00 A.M. for

(a) An order pursuant to Rule 56 FRCP awarding to defendant summary judgment dismissing the complaint; or, in the alternative,

(b) An order pursuant to Rule 65 FRCP directing that, *pendente lite*, plaintiff pay current interest installments on its promissory notes in the aggregate principal amount of $5,500,000 with interest at the rate of 4% per annum payable semi-annually; and

(c) For such other and further relief as may be just and proper.

DEFENDANT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE, that pursuant to Rule 9(c)(2) of the General Rules of this Court, answering affidavits and memoranda in opposition are required to be served at least three (3) days before the return date of this motion.

Dated: June 7, 1972

Yours, etc.

SHEIB, SHATZKIN & COOPER

By: /s/ EDWARD LABATON
A member of the firm
Attorneys for Defendant

TO:

Powers & Gross, Esqs.

STATEMENT UNDER RULE 9(g) GENERAL RULES.

*Statement Under Rule 9(g)*

*General Rules*

Defendant contends that there is no genuine issue to be tried as to the following material facts:

1. Plaintiff and defendant executed four contracts dated December 2, 1968, pursuant to which plaintiff acquired the four Faggen Companies and issued notes in the principal sum of $5,500,000 and which contracts contained the following provision:

> "(f) the liability of the seller under this ¶4.4 [relating to indemnity for breach of warranty or misrepresentation by the defendant] or for breach of warranty shall completely terminate on March 31, 1970, except (i) as to any claim, demand, action, suit or proceeding of which notice is given as required of subparagraph (d) prior thereto; and * * *."
> [Other provision not applicable.]

2. Plaintiff made no claim or demand or commenced any action, suit or proceeding prior to March 31, 1970.

STATEMENT UNDER RULE 9(g) GENERAL RULES

3. Prior to the transaction of which plaintiff complains, it had in its possession copies of the statements of income of the "Faggen Companies" for each of the fiscal years ending 1964 to 1968 inclusive.

4. Between December 2, 1968 and March 1969, plaintiff conducted an audit of the Faggen Companies.

5. The statement of "Net Income - Pre-Tax adjusted to basis which will prevail after acquisition" of the Faggen Companies attached as part of Exhibit 1 of the complaint was not a representation of the income of the Faggen Companies restated on an accrual basis, but rather it was part of an analysis dealing with the potential achievement of reasonable goals of growth; the adjustments made were adjustments which excluded expenses which would not have been payable by the Faggen Companies had the acquisition taken place in 1964.

6. Since December 2, 1968, plaintiff has taken from the Faggen Companies securities having a fair market value at the time of transfer of approximately $1,368,000 plus approximately $935,000 in cash.

AFFIDAVIT OF HAROLD FAGGEN IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,

County of New York, ss:

HAROLD FAGGEN, being duly sworn, deposes and says:

1. I am the defendant in this action. I submit this affidavit in support of defendant's motion for summary judgment dismissing the complaint or, alternatively, for an injunction directing that the plaintiff, *pendente lite*, make current interest payments on its promissory notes in the aggregate principal sum of $5,500,000 bearing interest at the rate of 4% per annum. Plaintiff has defaulted on payment of the semi-annual interest installment of $110,000 which was due on May 1, 1972.

*Nature of the Action*

2. Plaintiff, suing under Rule 10b-5 under the Securities Exchange Act of 1934 and the "securities laws of New York", seeks to rescind a transaction by which, in December 1968, it acquired the stock of four companies of which I was the principal stockholder (said four

companies are hereinafter referred to as the "Faggen Companies") in exchange for which it issued promissory notes in the aggregate face amount of $5,500,000 with interest at 4%.

*Basis of the Motion for Summary Judgment*

3. The motion for summary judgment is made on two alternative grounds:

(a) On the face of the contracts by which the plaintiff acquired the Faggen Companies, the time within which to commence an action terminated on March 31, 1970.

(b) Assuming *arguendo* that plaintiff had brought the action prior to March 31, 1970, the documents which plaintiff claims to be false have been totally distorted by plaintiff, could not be introduced into evidence, were not material to the transaction, and were not relied upon by the plaintiff.

If this court finds that there is a triable issue, then in the alternative I request an injunction directing that interest payments be made *pendente lite*. This relief is based on:

(a) The presumption of validity of the promissory notes.

(b) The undisputed fact that plaintiff has already taken more than $2,300,000 from the Faggen Companies, which sums with interest would have to be reimbursed if the plaintiff were to prevail in this action.

(c) My dependence on the interest payments to meet substantial personal obligations.

*The Facts*

4. Prior to October 1968, the Faggen Companies were primarily engaged in the business of providing actuarial services principally to pension and welfare funds, a business which I started in 1947. The net income before taxes of the Faggen Companies in the five fiscal years prior to the acquisition by plaintiff had ranged from approximately $230,000 to approximately $365,000. In 1968, I determined to sell the companies because I was beginning to approach retirement age and I thought it best to provide for my family and for the orderly continuation of the business under the direction of a larger entity. Plaintiff was one of the companies with whom I discussed sale. As of December 31, 1967, plaintiff was a large public company with total assets of $68,761,407 and net worth of $10,389,924. Early in October 1968, at

a preliminary stage in our discussions, I provided a summary description of the business (Exhibit A hereto) which included a statement of income for the years 1964-68 adjusted to reflect the elimination of expenses (with respect to such items as pension contributions, executive salaries, travel and entertainment expenses, etc.) that would not have been incurred if an acquisition had taken place in 1964. (Such statement is hereafter referred to as the "pro forma statement".) For example, plaintiff and I had tentatively agreed that in the event of acquisition I would be employed at an annual salary of $50,000. During the years 1965-68, my income derived from the Faggen Companies was substantially higher than that amount. Thus, there was added to the historical net income figures the difference between the projected salary and the amounts made in the past. Exhibit A has been retyped (with some errors) and is attached to the complaint as Exhibit 1. The implication in the complaint (¶5) that the adjustments related to a change from treatment on a cash basis to treatment on an accrual basis is simply wrong. The summary was not a restatement on an accrual basis and was not represented to be such.

AFFIDAVIT OF HAROLD FAGGEN

5. After the presentation of the memorandum, negotiations continued at arm's length between my counsel and me on one hand, and Titan and its counsel on the other. In connection with those negotiations and as part of the final agreement, I provided the plaintiff with the actual income tax returns of the Faggen Companies for the fiscal years ending in 1964 to 1968 inclusive and interim financials for the period ended September 30, 1968. The income returns showed the historical net income of the Faggen Companies in the five year period; they were made part of the agreements pursuant to which the Faggen Companies were acquired by plaintiff. Attached hereto as Exhibit B is a summary showing the actual net income before federal income taxes reflected in the returns supplied to plaintiff and included in the acquisition agreements. Exhibit C (submitted in a separate binder) shows copies of the actual returns and interim financial statements.

6. Attached hereto as Exhibit D is a copy of the agreement (without exhibits) by which plaintiff acquired Harold Faggen Associates, Inc. The agreements by which the three other Faggen Companies were acquired are almost identical to Exhibit C, except for (a) the name of the

entity; (b) the name of the selling stockholder; and (c) the principal amount of the promissory notes issues by plaintiff in consideration for the stock. Paragraph 4.4 of each agreement provides that any action based upon any breach of any warranty under the agreement must be commenced by March 31, 1970 unless demand is made prior thereto. In this connection, it should be noted that following the consummation of the purchase of the Faggen Companies the plaintiff conducted an audit of the Faggen Companies, which audit was completed in March 1969. The books and records of the Faggen Companies were again audited by plaintiff's independent certified public accountants early in 1970. No demand or claim was made, nor was any action or proceeding commenced by March 31, 1970. Indeed, prior to the commencement of this action, there was no indication whatever that there was any inaccuracy in any of the figures supplied to the plaintiff as part of any of the agreements.

7. In connection with the second count, an analysis of which appears in the accompanying memorandum, all of the books and records and the original source documents with respect thereto have been in the possession of the plaintiff since December 2, 1968. The request for

"worksheets" was made by letter dated February 9, 1972 (Exhibit E hereto). I responded in writing to the attorney for plaintiff (Exhibit F hereto) on April 9, 1972, the delay having been occasioned by my serious illness.

*The Alternative Relief*

8. By way of alternative relief, I respectfully request that pending the determination of this action current interest on the promissory notes be paid (Attached hereto as Exhibit G is one of the notes in the series, all of which are identical in form). That interest amounts to approximately $220,000 a year and plaintiff has defaulted in the payment due on May 1, 1972. Even if the plaintiff were to prevail and obtain rescissional relief, it would have to restore the monies and other assets which it took from the Faggen Companies plus appropriate interest.

9. In January 1969, shortly after the acquisition of the Faggen Companies, plaintiff transferred to itself marketable securities having a market value (as of December 31, 1968) of approximately $1,368,000 from the Faggen Companies. A schedule of such securities is attached hereto as Exhibit H. In the three years following the

acquisition of the Faggen Companies, plaintiff transferred to itself from the Faggen Companies approximately $935,000. In that same period, no capital was invested by plaintiff in the Faggen Companies. Thus, if the plaintiff prevailed, it would have to return more than $2,300,000 plus appropriate interest.

10. The alternative relief is important because this action itself is the culmination of a series of coercive devices seeking to compel me to surrender my rights and to convert the notes into common stock. Beginning early in 1971, plaintiff began a campaign to persuade me to convert the promissory notes into common stock. The plaintiff used the carrot and the stick; threats were made that the company would be drained and made into a shell. These threats were usually accompanied by promises to me of long term employment contracts and substantial stock bonuses. For example, in May 1971, the plaintiff proposed that I convert the notes into common stock, offering to issue to me 99,250 additional shares of its common stock over and above the 287,500 shares into which the notes are convertible. This action was commenced at a time shortly after I underwent surgery with the plaintiff fully aware that I required the interest

to meet pressing obligations to my former wife and to my family. Under my separation agreement, I am required to pay to my former wife $52,000 a year. My present salary is $50,000 a year. I have been informed by plaintiff that it desires to terminate my employment as Chairman within 60 days but that it proposes to offer me employment as a consultant presumably at a lesser salary. Except for the interest on the notes, I have no source from which to meet that obligation.

The separation agreement was entered into on April 10, 1970. Under the agreement, plaintiff's notes in the principal face amount of $1,500,000 were placed in escrow to secure my obligation. Prior thereto, plaintiff delivered an estoppel letter and telegram asserting that the notes "are valid and outstanding obligations of Titan Group, Inc." (Exhibit I). In addition, I have a loan obligation to the Franklin National Bank, the balance of which is $180,000. That loan is secured by notes in the principal sum of $1,000,000. I am committed to amoritze that loan at the rate of $40,000 a year in addition to paying interest on the unpaid balance. Because of plaintiff's default, I was unable to make the $20,000 payment due in May, or the interest of approximately $1,000 a month.

AFFIDAVIT OF HAROLD FAGGEN

11. If the motion for summary judgment is denied, I will be prepared to go to trial forthwith.

12. In summary, on the face of the papers, it appears that this action is totally without merit, that plaintiff has, some three and a half years after an arm's length agreement, decided that it made a bad deal and by patently specious claims is seeking to avoid its clear obligations under that agreement.

Wherefore, I respectfully request that this court grant defendant's motion for summary judgment dismissing the complaint or in the alternative that plaintiff be directed forthwith to pay all interest due on the promissory notes referred to in the complaint and to pay all other interest as and when due pending the determination of this action.

(Sworn to by Harold Faggen, June 7, 1972.)

EXHIBIT A, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN.

Harold Fagen Associates, Inc., was A
organized in 1956 to take over the business
started by Harold Fagen during the latter
part of 1946.

Harold Faggen Associates, Inc., and several
related organizations function primarily as consulting
actuaries to multi-employer pension funds,
welfare funds, supplemental unemployment funds, etc.

As shown in Exhibit B, attached there are
143 clients, most of which have been clients
continuously for more than ten years.

The staff consists of 33 persons and is being
expanded as rapidly as competent experienced persons
can be found. The stability of the staff is
demonstrated by the fact that only eleven employees
have been on the staff for five years or less.
Eighteen employees have been on the staff for ten
years or longer.

EXHIBIT A, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

We occupy the ninth floor of a fire proof building at 853 Broadway. The floor contains approximately 6,000 net feet. It is expected that an additional 3,000 square feet on the eighth floor will be occupied within the near future. The space on the eighth floor is vacant and a lease is being negotiated.

Harold Faggen Associates, Inc., owns a number of pieces of IBM unit record equipment and leases an IBM 360 model 20 computer. The present system uses cards but two disk drives are on order and delivery is expected within the next few weeks.

Since we are in constant touch with many trade unions, we have undertaken the task of programming a completely automated union office. Any potential client has only to call us and we can test the programs on the client's own equipment for

EXHIBIT A, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

Since we have both actuarial and computer capacity, we are in the process of programming computerized pension plan calculation for small and medium size employers. We expect to provide these services to stock brokers, accountants and lawyers only the availability of packaged pension plan services at very reasonable prices will enable stock brokers to service these pension plans instead of leaving them for the insurance companies. It will also be possible for the thousands of accounting firms throughout the Country to service their clients with pension fund advice as the Ostheimer Division of Peat, Marwick, Mitchell services their clients. The profit potential inherent in our operation makes it possible for us to achieve any reasonable goal we set while, at the same time, absorbing the substantial costs involved in developing our programs. As shown in Exhibit A, attached, we left before tax has been provided of $

EXHIBIT A, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

Compound rate of interest 15 percent
a year.

EXHIBIT A, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

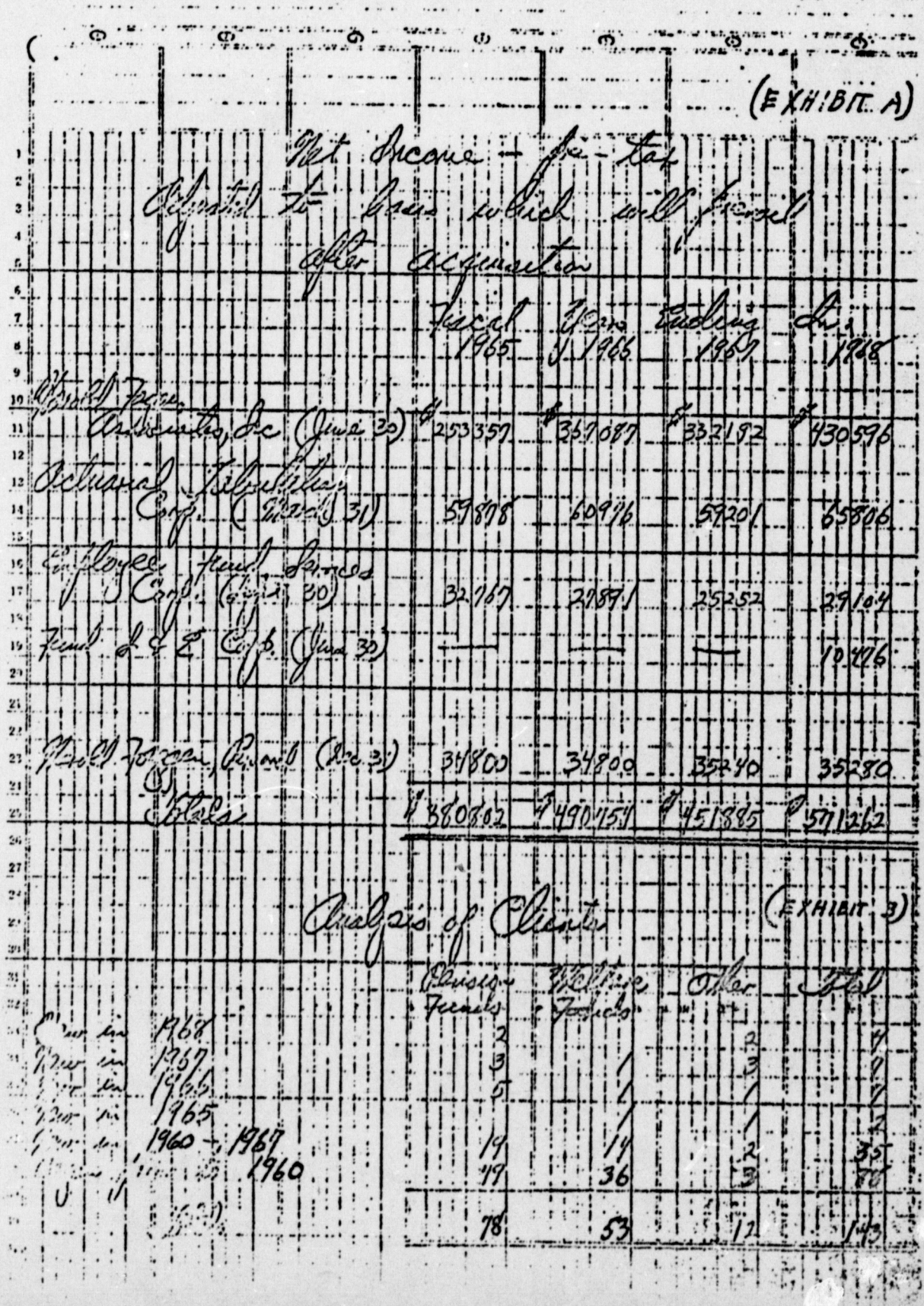


EXHIBIT B, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN.

The Faggen Companies Summary of Taxable Income Reported on Returns Filed - Exhibit B on Contracts dated December 2, 1968

| Name of Company | Fiscal Year Ending | Taxable Income Reported | |
|---|---|---|---|
| Harold Faggen Associates, Inc. | 6/30/68 | $ 288,494 | |
| Actuarial Tabulating Corp. | 3/31/68 | 40,045 | |
| Employee Fund Services Corp. | 9/30/68 | 25,960 | |
| Fund S & E Corp. | 6/30/68 | 10,476 | |
| Total for Fiscal Year ending in 1968 | | | $ 364,975 |
| Harold Faggen Associates, Inc. | 6/30/67 | $ 185,571 | |
| Actuarial Tabulating Corp. | 3/31/67 | 39,139 | |
| Employee Fund Services Corp. | 9/30/67 | 21,597 | |
| Total for Fiscal Years Ending in 1967 | | | $ 246,306 |
| Harold Faggen Associates, Inc. | 6/30/66 | $ 290,691 | |
| Actuarial Tabulating Corp. | 3/31/66 | 37,585 | |
| Employee Fund Services Corp. | 9/30/66 | 24,026 | |
| Total for Fiscal Years Ending in 1966 | | | $ 352,302 |
| Harold Faggen Associates, Inc. | 6/30/65 | $ 188,177 | |
| Actuarial Tabulating Corp. | 3/31/65 | 38,593 | |
| Employee Fund Services Corp. | 9/30/65 | 31,010 | |
| Total for Fiscal Years Ending in 1965 | | | $ 257,780 |
| Harold Faggen Associates, Inc. | 6/30/64 | $ 173,988 | |
| Actuarial Tabulating Corp. | 3/31/64 | 29,149 | |
| Employee Fund Serfices Corp. | 9/30/64 | 26,798 | |
| Total for Fiscal Years Ending in I964 | | | $ 229,935 |

EXHIBIT C, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN.

Income Tax Returns and Financials of the "Faggen Companies".

(To be submitted on the argument of the appeal.)

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN.

AGREEMENT OF SALE

Agreement of Sale made this 2nd day of December, 1968, as of October 1, 1968, between HAROLD FAGGEN (hereinafter referred to as the "Seller") and TITAN GROUP, INC., a Delaware corporation having its principal office at 529 Fifth Avenue, New York, New York (hereinafter referred to as "Titan").

RECITALS

This Agreement is made in light of the following circumstances:

(i) The Seller owns all of the issued and outstanding stock of Harold Faggen Associates, Inc., a New York corporation with its principal place of business at 853 Broadway, New York, New York (hereinafter referred to as the "Company"); and

(ii) The Company is in the business of providing actuarial and computer services and related activities; and

(iii) Titan (together with its subsidiary corporations) is engaged in diverse real estate, insurance, service and related activities; and

(iv) Titan and the Seller believe that it would be in their mutual best interests, and in the interest of Titan's shareholders, for Titan to purchase and acquire all of the issued and outstanding stock of the Company.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter contained, the parties hereto agree as follows:

1. Transfer of Stock. For the consideration hereinafter provided, the Seller hereby agrees to and hereby does sell, transfer, assign and convey to Titan and Titan hereby agrees to and hereby does purchase from Seller all of the issued and outstanding stock of the Company.

2. Consideration for the Shares of Stock of the Company. In consideration for said sale, transfer and assignment by the Seller, Titan simultaneously herewith has paid to the Seller an aggregate purchase price of Three Million Nine Hundred Sixty Thousand Ten Dollars ($3,960,010), which is represented by a check in the amount of $10 and Titan's 4% Convertible Installment Notes (the "Notes") in an aggregate principal amount equal to such purchase price (less the amount of the above-referred to check), which Notes and check Titan has delivered to the Seller and the Seller hereby acknowledges receipt thereof. The Notes are dated as of October 1, 1968, bear interest at the rate of four percent (4%) per annum, and are payable in five installments as set forth in and otherwise in the form attached hereto as Exhibit "A".

3. Representations and Warranties of the Seller. The Seller represents and warrants the following as of the date hereof:

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

3.1 Financial Statements. Attached hereto and made a part hereof are the following exhibits:

Exhibit B - Tax returns including income statement balance sheet and supporting schedules of the Company for each of its last five (5) complete fiscal years.

Exhibit C - Unaudited financial statements of the Company prepared by Joseph Warren & Company, consisting of a balance sheet as of September 30, 1968, and a statement of income and expenses for the three (3) months ended September 30, 1968, together with the comments in the accompanying letter of transmittal from Joseph Warren & Company to the Company.

(i) Exhibit "B" consists of copies of the tax returns filed by the Company for the fiscal years indicated thereon.

(ii) Subject to the matters contained in the letter of transmittal which is part of Exhibit "C", said Balance Sheet presents fairly the financial condition of the Company as at September 30, 1968, and said statement of income and expenses presents fairly the results of the Company's operations for the three (3) month period ended September 30, 1968. The said financial statements were prepared from the books and records of the Company and except as indicated therein were prepared in conformity with generally accepted accounting principles.

3.2 Investment in Other Entities. There are no entities in which the Company has any debt (other than trade

accounts receivable) or equity interest, or any right or option to acquire any such interest, other than as set forth on a schedule initialled by the Seller and delivered herewith.

3.3 Organization and Good Standing of the Company. The Company is a corporation duly organized and existing and in good standing under the laws of New York and has full corporate power to carry on its business as now conducted, and is entitled to own or lease or operate its properties and assets now owned, leased or operated by it. The Company is qualified to do business and is in good standing in each jurisdiction in which the nature of its business and or the character of its properties make such qualification necessary.

3.4 (i) Outstanding Securities of the Company. The authorized capital stock of the Company consists of two hundred shares of common stock without par value. There are presently issued and outstanding three shares, all of which are validly issued, fully paid and nonassessable. Other than as disclosed in exhibits to this Agreement, no shares of the Company are held by it in its treasury or otherwise.

(ii) Outstanding Options and Warrants. There are no options, warrants or other rights outstanding for the purchase of, nor any securities convertible into, capital stock of the Company, whether issued, unissued or held in the treasury.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

3.5 Absence of Certain Changes. Other than as disclosed in exhibits to this Agreement, since September 30, 1968, there has not been:

(i) any material adverse change in the financial condition, assets, liabilities, or businesses of the Company;

(ii) any damage, destruction or loss, whether or not covered by insurance, materially and adversely affecting any of the Company's properties or businesses;

(iii) any material increase in the compensation payable or to become payable by the Company to any employees or agents, or any bonus payment or arrangement made to or with any thereof, except as shown on Exhibit "D",

(iv) except as set forth herein, any payment by the Company of dividends or any distribution by it of any assets of any kind whatsoever to its stockholder in redemption or as the purchase price of any capital stock or in discharge or cancellation, whether in part or in whole, of any indebtedness (whether in payment of principal, interest or otherwise) owing to any of same;

(v) any mortgage, pledge or subjection to lien, charge or encumbrance of any kind of the Company's assets, tangible or intangible;

(vi) except as set forth herein, any sale or transfer of the Company's assets, or any cancellation of any

of the debts or claims of the Company except in the ordinary course of business and except for the transfer of two automobiles to employees of the Company for an amount equal to their book value;

(vii) any material amendment or termination of any material contract, agreement or license, to which the Company is a party otherwise than in the ordinary course of business, or any material amendment or termination of any contract, agreement, license, or relationship with any customer of the Company which in the most recent fiscal year of the Company paid to the Company fees aggregating five per cent (5%) or more of the Company's gross revenue;

(viii) any commitment by the Company (through negotiations or otherwise) or any liability incurred to any labor organization actually or purportedly representing or attempting to represent any of the employees of the Company except as set forth on Exhibit "E"; or

(ix) any event or condition of any character, materially and adversely affecting the businesses or properties of the Company.

3.6 Contracts. Attached hereto as Exhibit "F" is a schedule of all Material Contracts and Commitments containing a list of all such contracts and commitments to which the Company is a party or by which it is bound. For the purpose of this Paragraph 3.6, the term "Material Contracts and Commitments" shall be defined as (i) all contracts or commitments out of the ordinary course of business; (ii) all contracts and

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

commitments involving an obligation to render services during a fixed period of time at a fixed compensation; (iii) all contracts or commitments affecting ownership of, title to, use of, or any interest in real estate; (iv) all bonuses, incentive compensation, pension, group insurance or employee welfare plans of any nature whatsoever; (v) all collective bargaining agreements or other contracts or commitments to or with any labor unions or other employee representatives or groups of employees; (vi) employment contracts and all other contracts, agreements or commitments to or with individual employees or agents extending for a period of more than six (6) months from the date hereof or providing for earlier termination only upon the payment of a penalty or equivalent thereof; (vii) all other contracts or commitments providing for payments based in any manner upon the sales, purchases or profits of the Company; (viii) any contract or commitment, whether in the ordinary course of business or not, which involves future payments, performance of services or delivery of goods and/or materials, to or by the Company of an aggregate amount or value in excess of Twenty-five Thousand Dollars ($25,000) excluding commitments terminable at any time by the Company without cost or penalty to perform services for customers or clients. There has not been any material default in any obligation to be performed by the Company under any such Material Contract or Commitment listed on the said Exhibit "F", and the Company has not waived or suffered

the loss or extinguishment of any material right under any such Material Contract or Commitment.

3.7 Properties. Attached hereto as Exhibit "C" is a schedule of all real property owned in fee by the Company, together with a summary of all other real property, including leaseholds and options to purchase real property, owned by the Company or in which it has any interest, containing an accurate description thereof and an accurate summary of the principal terms of all leases and options to purchase real property, including the names of its lessors and persons or entities against whom options to purchase real property are or will be exercisable. The Company has good and marketable title to all of its properties and assets (including but not limited to those reflected in its Balance Sheet as at September 30, 1968, except as since sold or otherwise disposed of in the ordinary course of business), all free and clear of all covenants, conditions, easements, liens, charges and encumbrances other than as set forth in exhibits attached to this Agreement, and other than liens for property taxes not delinquent. The plants, structures, leasehold improvements, equipment, and other tangible assets of the Company are, to the knowledge and belief of the Seller, in good operating condition and repair, subject only to ordinary wear and tear. There has been no failure of the Company to comply in all material respects with all laws, regulations and orders applicable to its

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

properties and businesses which has not been remedied without material adverse effect upon the businesses and/or assets of the Company.

3.8 Absence of Undisclosed Liabilities. Except as specifically set forth in the Balance Sheet as at September 30, 1968, annexed hereto as part of Exhibit "C" or in any other exhibits to this Agreement, the Company is not obligated for, nor are any of its assets or properties subject to, any liabilities or materially adverse obligations, whether or not such liabilities are normally shown or reflected on a balance sheet prepared in a manner consistent with generally accepted accounting principles, other than liabilities or obligations arising in the ordinary course of business since September 30,1968, none of which are materially adverse. The Company is not in default in respect to any material term or condition of any indebtedness or liability (including trade payables). There are no facts in existence on the date hereof and known to the Seller which might reasonably serve as the basis for any material liabilities or obligations of the Company not disclosed in this Agreement or in exhibits thereto.

3.9 Outstanding Indebtedness. Attached hereto as Exhibit "H" is a true and complete list of all indebtedness (other than trade accounts payable and normal accruals of expenses and taxes arising in the ordinary course of business with respect to which no assets have been pledged or otherwise hypothecated, voluntarily or involuntarily), of the Com-

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

pany or with respect to which any of its properties or assets are subject, including a description of all of the terms thereof, and a description of all properties or assets pledged, mortgaged or otherwise hypothecated (voluntarily or involuntarily) as security therefor.

3.10 Tax Returns and Audits.

(i) The Company has filed all income, franchise and other tax returns required to be filed (including those owing to the United States or other government or any subdivisions thereof) by it by the date hereof, or has duly obtained extensions of time by which said returns must be filed. The provisions for federal, state, and local taxes reflected on the Balance Sheet as at September 30, 1968, annexed hereto as part of Exhibit "C" are adequate to cover its liabilities for such taxes with respect to the period then ended and for all prior periods.

(ii) The Company has not consented pursuant to the provisions of Section 341(f) of the Internal Revenue Code

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

of 1954, as amended, to have the provisions of Section 341(f)(2) apply to the transfers of stock pursuant to this Agreement.

3.11 Litigation. Except as set forth in Exhibit "I" attached hereto, neither the Company nor the Seller has been served with any summons, complaint or notice to arbitrate, and the Seller has no knowledge of any suit, equitable or legal, administrative, arbitration or other proceeding pending or threatened against the Company, which relates to the businesses, properties or assets of the Company.

3.12 Labor Problems. Except as disclosed in exhibits to this Agreement, the Company has not been a party to any contract or agreement with a labor union or any local or subdivision thereof actually or purportedly acting for or on behalf of any of the employees of the Company, nor has it been charged with

any unresolved unfair labor practices, nor does the Seller have knowledge of any present union organizing activity among any of the respective employees of the Company.

3.13 Insurance Coverage. The Company maintains policies of fire, liability, warranty, use and occupancy and other forms of insurance, covering its properties and assets, in amounts and against such losses and risks as are generally maintained for comparable businesses and properties, and valid policies for such insurance are outstanding and are duly in force.

3.14 Interests in Competitors, Suppliers, Customers, etc. Except as disclosed in Exhibit "J", neither the Seller nor members of the Seller's family owns, directly or indirectly, individually or collectively, a material interest in any corporation, partnership, firm or association which (i) is a competitor, potential competitor, supplier or customer of the Company, or (ii) has an existing contractual relationship with the Company, including but not limited to lessors of real or personal property leased to the Company and entities against whom rights or options are exercisable by the Company.

3.15 Indebtedness to Officers, Directors and Stockholders. Other than as set forth in Exhibit "K", the Company is not indebted to any of those persons who are stockholders, officers and/or directors of the Company or to their respective spouses or children in any amount whatsoever other than for compensation for services rendered.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

3.16 Articles of Incorporation and By-Laws. The Seller has heretofore delivered to Titan true, accurate and complete copies of the Articles of Incorporation and By-Laws, together with all amendments to each of same, of the Company. Nothing contained therein prevents or adversely affects the consummation of the transaction contemplated by this Agreement.

3.17 Corporate Minutes. The Seller has heretofore furnished to Titan for its examination the minute books of the Company containing complete and accurate records of any and all proceedings and actions at all meetings of its stockholders and Board of Directors required to be set forth in such minutes.

3.18 Onerous Agreements, etc. The Company is not a party to, or otherwise bound by, any contracts, commitments or undertakings (contractual or otherwise) which are materially adverse, onerous or otherwise harmful to its business, properties or assets, except as disclosed herein or in exhibits to this Agreement.

3.19 Brokerage and Finder's Fees. The Seller hereby warrants and represents that neither the Seller nor the Company, nor any of its employees or agents, has incurred any liability to any broker, finder or agent for any brokerage fees, finder's fees or commissions with respect to the transactions contemplated by this Agreement, which liability

will diminish the assets and properties of the Company or will affect the shares transferable to Titan hereunder, or which liability may be asserted against Titan or the Company.

3.20 Qualification in other States. The Company is not required to be and is not qualified to do business in any state.

3.21 Accounts Receivable. Attached hereto as Exhibit "L" is a schedule of accounts receivable of the Company as at September 30, 1968, properly aged in accordance with the date each account receivable originally came into existence, without taking into account any renewals thereof.

3.22 Salaried Employees. Attached hereto as Exhibit "D" is a schedule as of the date hereof showing the names of all persons to whom the Company has paid or is obligated to pay any salary or other compensation for the calendar year 1968 in excess of $10,000, their annual rate of compensation commencing October 1, 1968, and the nature of their duties entitling them to such compensation. Said schedule shall contain all of the employees of the Company except those whose compensation is based on an hourly or piece-work rate, or is a member of a collective bargaining unit.

3.23 Material Misstatements or Omissions. No representations or warranties by the Seller in this Agreement, nor any document, statement, certificate or schedule furnished to Titan pursuant hereto, or in connection with the transactions

contemplated hereby, contains or will contain any untrue statement of a material fact necessary to make the statements or facts contained therein not misleading.

4. Obligations and Covenants of the Seller. The Seller hereby covenants and agrees as follows:

4.1 Contemporaneously with the execution of this Agreement, the Seller has delivered to Titan:

(a) Certificates for the shares of stock described in Paragraph "1" hereof, duly endorsed in blank, with the necessary transfer stamps affixed, or funds therefor.

(b) True, complete and correct copies of the Certificate of Incorporation and amendments thereto, By-Laws and amendments thereto, Minute Books, Stock Transfer Books, and corporate seal of the Company.

(c) Certified copies of resolutions of the Board of Directors of the Company in the form specified by the banks with which the Company does business, substituting for all prior signatories on checks the names of Eugene A. Hegy, Jr., Anthony M. Frank, Richard K. McIntyre, Benjamin M. Robinson, Harold Faggen, Rose Dogan, George Stewart and Joseph Levine signing jointly; a list of each bank, savings and loan, or other financial institutions in which the Company has an account or safe deposit box, and the names of all persons, other than those set forth above, authorized to draw thereon or have access thereto.

(d) Resignations of all officers and directors of the Company.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

(e) Copies of minutes of the meeting of the Board of Directors of the Company electing the following persons as directors in place of those persons who have resigned as directors and officers:

Benjamin M. Robinson
Anthony M. Frank
Harold Faggen

and electing the following persons as officers:

| | |
|---|---|
| Harold Faggen | Chairman |
| Rose Dogan | President |
| Benjamin M. Robinson | Secretary |
| George Stewart | Treasurer |
| Joseph Levine | Comptroller |

(f) General releases of all claims, save as specifically herein qualified, of the Seller against the Company.

(g) Employment Contract between Harold A. Faggen and the Company in the form of Exhibit "M" annexed hereto.

(h) A written opinion of Simon Shaib, Esq., legal counsel for the Company, to the effect that: (i) the Company is duly organized and existing and in good standing under the laws of its state of incorporation and, to the best of said counsel's knowledge, is qualified to do business in other jurisdictions (including foreign countries) in which the nature of its business or the character of its properties makes such qualification necessary, or if not so qualified, is not subject to any material liability for its failure to qualify, and has full corporate power to carry on its business and to

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

own and operate its properties and assets now owned or operated by it; (ii) the authorized and outstanding capitalization of the Company is as specified pursuant to Paragraph 3.4(i) above; (iii) except as set forth on Exhibit "I", he does not know of any litigation, proceeding or governmental investigation pending or threatened against or relating to the Company or any of its properties or businesses or with respect to any of the capital stock of the Company; (iv) all proceedings required by law or by the provisions of this Agreement to be taken by the Seller in connection with the transactions provided for by this Agreement have been duly and validly taken; (v) to the best of such counsel's knowledge, the consummation of the transactions contemplated by this Agreement will not result in a breach of any of the provisions of, nor will it constitute a default under, nor will it invalidate or give any party a right to cancel or terminate any agreement or instrument to which the Company is a party; (vi) such counsel has no knowledge of any defects in the title to the assets and properties of, or to the capital stock of, the Company; and (vii) the Seller has the unrestricted right to transfer the shares of the Company to Titan and the certificates executed and delivered to Titan hereunder effectively vest in Titan good and marketable title to the shares of stock herein transferred, free and clear of any and all liabilities, obligations and encumbrances. In rendering his opinion, counsel for the Company may rely as to factual matters on certificates of

the Seller or of officers of the Company and upon such other evidence as he may deem necessary or desirable, including without limitation, opinions of associate counsel.

4.2 Further Documents, Etc. The Seller agrees that Seller will, upon request, from to time execute and deliver such other and further agreements as may be necessary and to testify in such proceedings and to do such other and further acts as may be necessary in the opinion of Titan's counsel to perfect the title to the shares of stock of the Company so sold hereunder in Titan or to protect the property of the Company, to aid in the prosecution or defense of other litigation or proceedings in connection with the business of the Company prior to the date hereof, all without further consideration but at the expense of the Company. The Seller agrees to cooperate and to use Seller's best efforts to have the officers, directors and other employees of the Company cooperate with Titan at its request and expense after the date hereof in endeavoring to effect the collection of all receivables and other items owing to the Company in connection with actions, proceedings, arrangements or disputes relating to the adjustment of federal income and other taxes of the Company for all periods prior to the date hereof, and in connection with any other actions, proceedings, arrangements or disputes involving the Company and/or Titan based upon contracts arrangements or acts of the Company which were in effect or occurred on or prior to the date hereof.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

4.3 Harold Faggen ("Faggen") agrees that he will not, for a period of five (5) years from the date hereof, except as an employee of Titan or an affiliate or subsidiary thereof, engage directly or indirectly as a shareholder, officer, director, partner, employee, consultant, agent or otherwise in any business providing actuarial and computer services which is competitive to the business of Titan, its affiliates or subsidiaries.

Nothing contained in the foregoing shall prevent Faggen from purchasing securities of any corporation whose securities are regularly traded on any national securities exchange or in the over-the-counter market, provided that such purchases shall not result in his and his associates collectively owning, directly or beneficially, at any time, ten per cent (10%) or more of the voting securities of any corporation engaged in any business competitive to that then carried on by Titan or any subsidiary or affiliate thereof.

4.4 Indemnification by Seller. The Seller shall indemnify and hold harmless Titan against and in respect of:

(a) Any damage or deficiency resulting from any misrepresentation or breach of warranty contained in Paragraph "3" of this Agreement or from any misrepresentation or omission from any certificate or other instrument furnished to Titan under this Agreement.

(b) All judgments, costs and reasonable expenses (including attorneys' fees) incurred in connection with or resulting from any action, suit or proceeding incident to any of the provisions of subparagraph (a) of this Paragraph 4.4.

(c) Titan shall give the Seller prompt written notice of all claims, demands, actions, suits or proceedings threatened, made or commenced against Titan or the Company relating to any matter which the indemnity provided for in this Paragraph 4.4 applies. The Seller shall have the right, at Seller's expense, to defend any such claim, demand, action,

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

suit or proceeding, using counsel of his own choosing. In such case, Titan or the Company shall have the right to be represented therein at their own expense. Nothing contained in this paragraph shall limit the right of Titan or the Company to settle any action, suit or proceeding brought against them.

(d) Except as set forth in subparagraph (c) of this Paragraph 4.4, the Seller shall reimburse Titan on demand for any payment made by Titan or the Company at any time after the date hereof with respect to any liability, obligation or claim to which the indemnity contained in this Paragraph 4.4 relates.

(e) The rights granted to Titan pursuant to the provisions of this Paragraph 4.4 shall not be construed to constitute a waiver by Titan of any of its remedies at law or in equity that it may have as a result of any misrepresentation or breach of warranty contained in this Agreement or nonperformance of any agreement on the part of the Seller under this Agreement or from any misrepresentation or omission from any certificate or other instrument furnished or to be furnished to Titan under this Agreement.

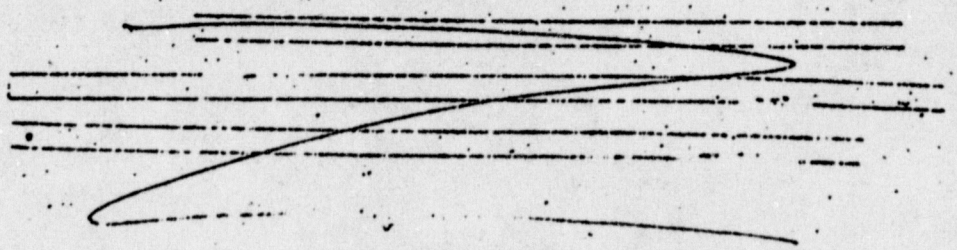


EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

(f) The liability of the Seller under this Paragraph 4.4 or for breach of warranty shall completely terminate on March 31, 1970, except:

(i) As to any claim, demand, action, suit or proceeding of which notice is given as required by subparagraph (d) prior thereto; and

(ii) As to any liability asserted or claimed against the Company or Titan for United States income taxes or any other taxes, federal, state or local, relating to the operations of the Company prior to October 1, 1968, in excess of the reserve therefor set forth on the Company's Balance Sheet as at September 30,1968, annexed hereto as part of Exhibit "C".

5. Representations and Warranties of Titan. Titan hereby represents and warrants the following:

5.1 Financial Statements. Attached hereto and made a part hereof, marked Exhibit "N", are consolidated financial statements for Titan and its subsidiaries as at and for the fiscal year ended December 31, 1967, and as at and for the nine months ended September 30, 1968.

The foregoing financial statements (i) are in accordance with the books and records of Titan and its subsidiaries respectively, (ii) set forth fairly Titan's and its subsidiaries' consolidated financial condition and the consolidated results of their operations as at the relevant dates thereof and for the periods covered thereby, all prepared in accordance with

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

generally accepted accounting principles, and (iii) contain and reflect all necessary adjustments for a fair presentation of the results of operations and financial condition for the periods covered by said financial statements.

5.2 Organization and Good Standing of Titan and its Subsidiaries. Titan is a corporation duly organized and existing and in good standing under the laws of the State of Delaware. Each of the material subsidiaries of Titan is a corporation duly organized and existing and in good standing under the laws of the respective state of its incorporation. Titan and its subsidiaries have full corporate power to carry on their respective businesses and to own and operate their respective properties and assets now owned or operated by them.

5.3 Authority of Titan. The execution of this Agreement by Titan and its delivery to the Seller have been duly authorized by the Board of Directors of Titan, and no further corporate action will be necessary on the part of Titan to make this Agreement valid and binding upon Titan in accordance with its terms.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

5.4 Absence of Certain Changes. Since September 30, 1968, there has not been any material adverse change in the financial condition, assets or business of Titan and its subsidiaries other than changes in the ordinary course of business, except, subsequent to September 30, 1968, as previously disclosed to the Seller, Titan sold certain of its assets which were carried on its books at that date in exchange for cash and certain mortgages. Prior to the end of its current fiscal year, Titan contemplates setting aside a reserve for possible future losses that may be incurred upon the sale of certain other assets, as previously disclosed to the Seller.

5.5 Issuance of Notes. The issuance by Titan of the Notes has been duly authorized by all necessary corporate action on the part of Titan, and the Notes, when executed and delivered to the Seller in accordance with the terms and conditions of this Agreement, shall constitute valid and legally binding obligations of Titan, enforceable in accordance with their terms except as limited by bankruptcy, insolvency, reorganization or similar laws, and shall be entitled to all of the benefits provided by this Agreement.

5.6 Common Stock of Titan to be Issued. The shares of common stock issuable upon any conversion of the Notes will, when issued in accordance with the terms of said Notes, be validly issued and outstanding, fully paid and nonassessable.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

5.7 Material Misstatements or Omissions. No representations or warranties by Titan in this Agreement, nor any document, statement, certificate or schedule furnished or to be furnished to the Seller pursuant hereto, or in connection with the transactions contemplated hereby, contains or will contain any untrue statement of a material fact, or omits or will omit to state a material fact necessary to make the statements or facts contained therein not misleading.

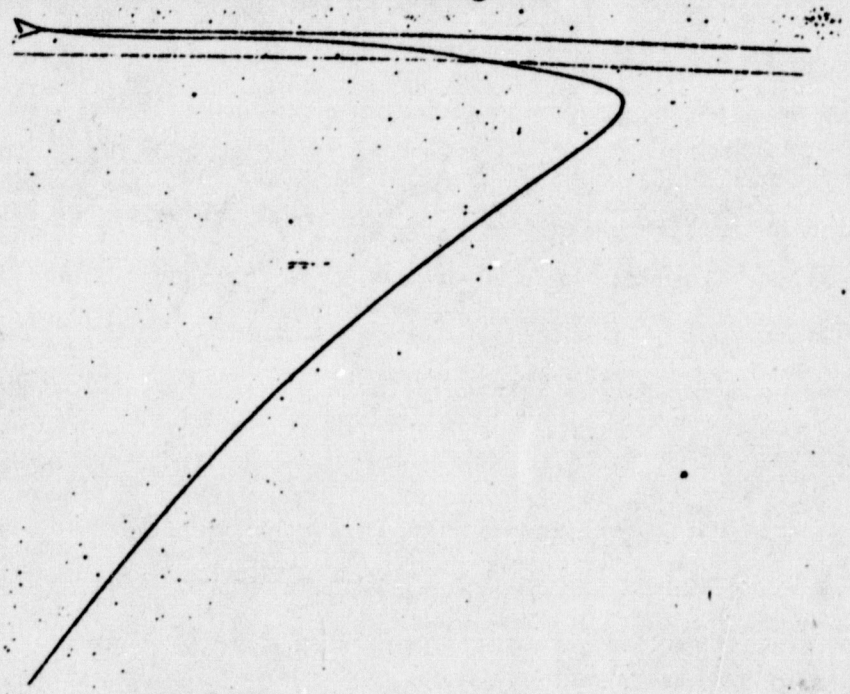


EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

6. Federal Securities Act. The parties hereto understand that the Notes issued are not and the shares of common stock (issuable upon conversion of the Notes) may not, at the time of issuance, be registered under the Securities Act of 1933, as amended (hereinafter referred to as the "Securities Act"). The aforesaid Notes are and the aforesaid shares may be issued in reliance upon the exemption contained in Section 4(2) of the Securities Act.

6.1 Letters of Representation.

The Seller does hereby represent and warrant that the Notes are and the shares of common stock issuable upon conversion of the Notes shall be acquired in good faith for investment only and not with a view to, or with the intention of, distribution or resale of any of same. The Seller agrees to deliver to Titan on each date when he shall receive shares of Titan stock issuable upon the conversion of the Notes, investment letters satisfactory in form restating all of the foregoing as of such date.

6.2 Transfer Without Registration.

The Seller shall not, without registration under the Securities Act, transfer any of the Notes or shares of stock issuable upon conversion of the Notes received by the Seller pursuant to the provisions of this Agreement without first having complied with each of the following conditions:

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

(i) Titan shall have received written notice of the proposed transfer setting forth the circumstances and details thereof;

(ii) Titan shall have received a written opinion from a law firm satisfactory to Titan specifying the nature and circumstances of the proposed transfer and indicating that the proposed transfer will not be in violation of any of the provisions of the Securities Act of 1933 and the Rules and Regulations promulgated thereunder; and

(iii) Titan shall have received a written opinion from its counsel to the effect that the proposed transfer will not be in violation of any of the provisions of the Securities Act of 1933 and the Rules and Regulations promulgated thereunder.

6.3 Incidental Registration Rights.

(a) Subject to the provisions of subparagraph (c) of this Paragraph 6, so long as the Seller is owner of any of the Notes or shares of Common Stock of Titan issued or issuable upon the conversion of the Notes, Titan shall offer the Seller the opportunity to include any of the shares of Common Stock of Titan issued or issuable upon the conversion of the Notes and any other shares of the Common Stock of Titan owned by Seller (hereinafter in this paragraph "6" referred to as the "Shares" in

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

any registration statement on Form S-1, or its then equivalent which Titan files. Titan shall give notice in writing to the Seller of any such proposed filing of a registration statement on Form S-1 or its then equivalent and if the Seller wishes to include any of Seller's Shares in such registration statement, the Seller shall so advise Titan in writing within thirty (30) days after the receipt of the written notice from Titan. Seller shall furnish all information required by Titan for inclusion in such registration statement, which information shall not contain any statement which, at the time and in the light of the circumstances made, is false or misleading with respect to any material fact necessary in order to make the statement not false or misleading. If the registration statement to be filed by Titan covers an underwritten offering, the Seller may, as a condition to having Seller's Shares included in such registration statement, be required to agree in writing that Seller will not sell, transfer or otherwise dispose of the Shares so to be registered within ninety (90) days of the effective date of such registration statement without the consent of Titan, provided that Titan shall agree to keep such registration statement effective until the earlier of (i) ninety (90) days from the time when the Seller is first able to sell Seller's said Shares pursuant to such registration statement, or (ii) the disposition by the Seller of all his Shares therein registered.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

(b) If, during any consecutive twelve-month period, Titan does not file a registration statement on Form S-1, or its then equivalent, in which the Seller shall have been invited to include any of Seller's Shares, then the Seller shall have the right to request in writing that Titan file a registration statement on Form S-1 or its then equivalent covering all or any part of the Seller's Shares provided that (1) the total number of Shares to be offered by the Seller shall not be less than Forty Thousand (40,000) Shares and (2) Titan shall have the right to file such registration statement on the basis of its financial data as at the end of its fiscal year (unless the Seller offers to pay the accounting fees incurred by Titan in order to file such registration statement based on financial data other than Titan's financial data at the end of its then fiscal year) in which the request for registration is made.

Titan agrees (i) to file such registration statement as soon as practicable, but in all events within five (5) months after the end of its then fiscal year; (ii) to make diligent effort to have such registration statement become effective as soon as practicable, and (iii) to keep the registration statement effective until the earlier of (A) ninety (90) days from its effective date, or (B) the disposition of the Shares therein registered, but in no event less than the

number of days, if any, required by law for the delivery of a prospectus in connection with such offering; and (iv) if the Seller's request is made within sixty (60) days after the end of any fiscal year of Titan, then Titan shall file the registration statement based upon its financial data for such fiscal year.

Notwithstanding anything to the contrary contained in this subparagraph (b) of this Paragraph 6, (1) the Seller shall not, except under the circumstances set forth in subparagraphs (d) and (e) of this Paragraph 6, be entitled to make any request of Titan to file a registration statement until on or after January 1, 1970; and (2) Titan shall not be obligated under this subparagraph (b) to cause more than (i) one registration statement in respect of a request of the Seller made between January 1, 1970 and December 31, 1971, and (ii) one registration statement in respect of a request of the Seller made after January 1, 1972.

(c) Notwithstanding anything to the contrary contained in subparagraphs (a) and (b), and except as provided in subparagraphs (d) and (e), Titan shall not be obligated to register, in the aggregate, more than 71,875 of the Shares between the date hereof and December 31, 1971.

(d) In the event of the death of Seller, if his Executor shall request a registration covering the sale of all

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

of his Shares and all of his family's Shares, including Shares held in trust for his children and grandchildren (his family shall consist solely of his wife, his children, and his grandchildren), and shall present to Titan a proposal for a firm underwriting with an underwriter or underwriters acceptable to Titan, then Titan shall, at the expense of the estate of Seller (including accounting fees in the event that Titan shall not be able under the applicable Rules and Regulations of the Securities and Exchange Commission to file such registration statement on the basis of its financial data as at the end of its then most recent complete fiscal year) file and use its best efforts to make effective a registration statement covering such Shares as requested by such Executor; provided, however, that if upon the receipt of such request Titan intends to file a registration statement on Form S-1, or its then equivalent, registering shares of Titan, then Titan shall have the right to include the Shares of Seller, including Shares held in trust for his children and grandchildren, and of his immediate family in such proposed registration statement, in which event the estate of Seller shall be required to pay only its proportionate share of the expense of the filing of such registration statement.

(e) In the event that at any time prior to November 1, 1971, (i) Titan shall have (1) merged or consolidated

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGEN

with or into, or sold substantially all of its assets to any other Corporation and (2) shall have exercised the option set forth in the Notes to call any or all of the Notes for prepayment in the event of such occurrence, and (ii) Seller shall have exercised the conversion privilege with respect to the Notes so called, Seller shall have the right to request in writing that Titan file a registration statement on Form S-1 or its then equivalent covering any of the Shares owned by the Seller. Upon such request by the Seller Titan agrees to file such registration statement under the terms set forth in the second paragraph of subparagraph (b) of this Paragraph 6. The Seller shall be entitled to make only one request for registration under this subparagraph (e).

(f) Other than underwriting discounts and commissions, if any, sales commissions, transfer taxes on any shares sold, and Securities and Exchange Commission registration fees thereon, and except as provided in subparagraph (d), any registration statements filed pursuant to the provisions hereof shall be at Titan's expense.

(g) Titan shall not be obligated to cause the filing of any registration statement in respect of any of the Shares or to include any of the Shares in any registration

statement filed by Titan, if Titan delivers to the Seller an opinion of its counsel that such registration is not required under the Securities Act for the sale thereof to the public.

6.4 Legend.

It is understood and agreed that the Notes and Shares shall bear a legend indicating their status under the Federal Securities Laws and referring to the pertinent provisions of this Agreement bearing on their transferability. It is further understood and agreed that Titan may give notice and appropriate stop-transfer instructions to the transfer agents of its Common Stock or the Notes, and Titan and any of its transfer agents may refuse to recognize the validity of any transfer by the holder thereof or his assignee and may refuse to record on Titan's or such transfer agent's book or records any transfer of any such Shares or Notes in violation of the provisions of the Notes or of this Agreement.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

7. Obligations and Covenants of Titan. Titan hereby covenants and agrees as follows:

7.1 Reservation of Shares. Titan shall hereafter keep reserved a sufficient number of shares of its Common Stock for the purpose of enabling, at all relevant times, the conversion of the Notes.

7.2 Opinion of Titan's Counsel. Contemporaneously with the execution of this Agreement, Titan has delivered to the Seller an opinion of its counsel, Robinson, Silverman, Pearce, Borden & Ball, stating (i) Titan is a corporation duly organized and existing and in good standing under the laws of the state of its incorporation; (ii) this Agreement has been duly and validly authorized, executed and delivered by Titan and is valid and binding upon Titan in accordance with its terms; (iii) the issuance and delivery of Titan's Notes to the Seller have been duly authorized by all necessary corporate action on the part of Titan, and the Notes, when executed and delivered in accordance with the terms and conditions of this Agreement, will constitute valid and legally binding obligations of Titan, enforceable in accordance with their terms, except as limited by bankruptcy, insolvency, reorganization and similar laws; and (iv) the issuance and delivery of Titan's Notes and the issuance of Titan's Common Stock upon conversion of the Notes, have been duly authorized and such stock issuable upon conversion will, when issued, be validly issued, fully paid and nonassessable. In rendering their opinion, counsel for Titan may rely as to factual matters on certificates of officers of Titan and such other evidence as they may deem necessary or desirable, including, without limitation, opinions of associate counsel.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

8. Other Acquisitions, etc., by Titan. It is understood and agreed by the Seller that, notwithstanding anything to the contrary herein contained, Titan may issue additional shares of its capital stock (whether Common or Preferred) or any other securities (whether convertible into capital stock or not), options or warrants, pursuant to a bona fide sale thereof, or with respect to the exercise of any stock options, or in connection with the acquisition of assets of, or stock of, other corporations, partnerships or proprietorships which Titan may desire to acquire, or in any other bona fide and arm's-length transaction, and that any such sale, issuance or acquisition shall not affect the terms hereof.

9. Survival of Representations.

9.1 All statements contained in any certificate or other instruments delivered by or on behalf of Titan or the Seller pursuant hereto, or in connection with the transactions contemplated hereby, shall be deemed representations and warranties by Titan and the Seller hereunder. Subject to subparagraph (f) of Paragraph 4.4, all representations, warranties and agreements made by Titan and the Seller shall survive the closing and any investigation at any time made by or on behalf of Titan or the Seller.

10. Benefit. This Agreement binds and benefits the successors and assigns of the parties hereto.

11. Paragraph Headings. The paragraph headings set forth herein are included for convenience only and shall not in any way affect the meaning or construction of this Agreement.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

12. Gender. The use of the masculine gender shall include the feminine wherever applicable.

13. Entire Agreement. This Agreement contains the entire understanding of the parties hereto relative to the subject matter hereof and may not in any way be altered, amended, modified or abrogated except by a writing signed by all of the parties hereto.

14. Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered or if mailed, by United States certified or registered mail, prepaid, to the parties or their assignees at the following addresses (or at such other address as shall be given in writing by either party to the other):

Titan Group, Inc.
529 Fifth Avenue
New York, New York

The Seller
853 Broadway
New York, New York

15. Remedies Not Exclusive. No remedy conferred by any of the specific provisions of this Agreement is intended to be exclusive of any other remedy, and each and every remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute or otherwise. The election of any one or more remedies by Titan or the Seller shall not constitute a waiver of the right to pursue other available remedies.

16. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

17. Construction. This Agreement shall be construed in accordance with the laws of the State of New York applicable to agreements made and performed in New York.

IN WITNESS WHEREOF, the parties have duly executed this Agreement.

TITAN GROUP, INC.

(Corporate Seal)

By _____

Attest:

THE SELLER

_____

_____

EXHIBIT E, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN.

POWERS AND GROSS
ATTORNEYS AT LAW
110 EAST [illegible] STREET
NEW YORK, N.Y. 10022

PLAZA 2-6004
AREA CODE 212

February 9, 1972

Mr. Joseph Warren
Joseph Warren & Co.
369 Lexington Avenue
New York, New York

Re: Titan Group, Inc.

Dear Mr. Warren:

Pursuant to our telephone conversation of yesterday, as counsel for Titan Group, Inc., I hereby make this written demand upon you that you promptly supply the following described materials to Titan Group, Inc.

1 - Copies of all of your accounting work papers, summaries and related materials for the Harold Faggen group of companies, for the calendar years 1966, 1967 and the nine months ending September 30, 1968.

2 - Copies of the same documents relating to the period October 1, 1968 through December 31, 1968.

3 - Copies of the same materials for the calendar year 1969.

This request is made by Titan Group, Inc. to you as the accountants acting for the corporation during the year 1969 and for the period October 1, 1968 through December 31, 1968, so that the corporation and its certifying accountants can review all of such material prepared by you at its request during such period.

This request is made upon you for the period 1966, 1967 and nine months ending September 30, 1968 pursuant to the several agreements of sale by which the Faggen group companies were sold to Titan Group, Inc. and specifically under paragraph 4.2 of all four agreements relating to the Faggen companies. Such paragraph 4.2 requires that the Seller shall "do such other and further acts as may be necessary in the opinion of Titan's

EXHIBIT E, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

Joseph Warren & Co. February 9, 1972

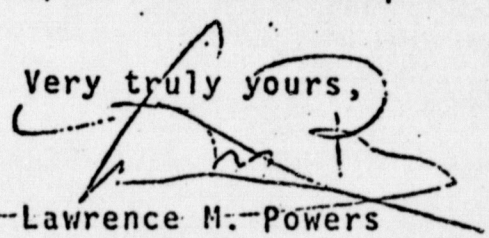
counsel.....to protect the property of the Company, to aid in the prosecution or defense of other litigation or proceedings in connection with the business of the Company prior to the date hereof [the subject contract], all without further consideration but at the expense of the Company. The Seller [Mr. Faggen] agrees to cooperate and to use Seller's best efforts to have the....other employees of the Company cooperate with Titan at its request and expense after the date hereof in endeavoring to effect the collection of all receivables and other items owing to the Company....and in connection with any other actions, proceedings, arrangements or disputes involving the Company and/or Titan based upon contracts, arrangements or acts of the Company which were in effect or occurred on or prior to the date hereof."

The covenant commonly referred to as a "covenant of further assurances" requires Mr. Faggen to cooperate and use his best efforts to have you supply the aforesaid work papers and accounting summaries. Such covenant is repeated, substantially verbatim, in the agreements of October 1, 1968 with respect to Actuarial Tabulating Corp., Harold Faggen Associates, Inc., Employee Fund Services Corp. and Fund S & E Corp.

We are sending a copy of this demand to Mr. Faggen to insure his prompt cooperation in accomplishing delivery of these papers to us. We will be in touch with the Peat Marwick firm and make arrangements for someone from their office to pick up these documents and conduct any further questioning thereon with you.

We appreciate your cooperation with respect to the foregoing.

Very truly yours,



LMP/ms Lawrence M. Powers

cc: Harold Faggen
Robert James Frankel
Dan Hatcher

EXHIBIT F, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN.

HAROLD FAGGEN ASSOCIATES, INC.

853 BROADWAY
NEW YORK, N. Y. 10003
477-5106

April 20, 1972

Lawrence M. Powers, Esq.
Powers and Gross
110 East 59th Street
New York, New York 10022

Dear Mr. Powers:

As you have been fully aware, serious illness has prevented an earlier response to your letter of February 9, 1972 addressed to Joseph Warren, requesting certain financial data. Since February 9, and at a meeting of the Board of Directors of Titan Group, Inc., on April 6, which the same illness prevented me from attending, you advised the Directors with respect to proposed litigation directed against me. You must know, and the Board should have been advised, that all original source financial records for the years requested have been and are in the possession of Titan Group, Inc., either in New York City or in Louisville, Kentucky, and that they have been reviewed by Titan Officials. As of this time, all the financial records are in the possession of Craig Thursby, having been turned over to him at the written instruction of the Chairman of the Board and Chief Executive Officer of Titan Group, Inc., Mr. Robert James Frankel.

Neither I, nor the other Directors of Titan Group, Inc., are unaware of the fact that, for some time, Mr. Frankel has sought to employ the duress of threatened litigation, knowing full well that it is without foundation, to compel a restructuring of the 1968 transactions in order to convert my position from that of creditor to shareholder. Motivated by a desire to relieve Titan Group, Inc. of its indebtedness, Mr. Frankel has conducted a campaign to find a basis for a lawsuit, however spurious.

You cite paragraph 4.2 of the acquisition contracts in support of your request for financial data. Paragraph 4.2 was intended to facilitate the protection by the corporation of its property. This section was to be invoked in good faith, and against third parties. It was not intended to be employed as a harassing tool against signatories. Your request for accounting work papers when original source materials were and are available is nothing short of harassment.

EXHIBIT F, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

HAROLD FAGGEN ASSOCIATES, INC.

Lawrence M. Powers, Esq.
Powers and Gross

April 20, 1972



If you created the impression in the minds of the Directors that the lack of response to your letter of February 9, 1972 constitutes a conscious attempt on my part to conceal information either from you or the Board, that impression is incorrect and should be corrected, in view of the fact that Titan Group, Inc. has always had and still does have all financial records relating to the "Faggen group of companies".

Yours very truly,

Harold Faggen

HF:js
cc: Simon Sheib, Esq.
Mr. Robert James Frankel
Mr. Daniel G. Hatcher, Jr.
Mr. Joseph Warren
Mr. Aron Drost
Mr. George F. Duthie
Mr. Jack L. Farley
Alvin M. Kendis, Esq.
Mr. Herzl Mendelsohn
Benjamin M. Robinson, Esq.
Mr. Ronald Rosenfeld

OPEIU 153, AFL-CIO

EXHIBIT G, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN.

№ A20- 22

# TITAN GROUP, INC.

$100,000

## 4% CONVERTIBLE INSTALLMENT NOTE DUE NOVEMBER 1, 1978
## SERIES A

New York, New York
October 1, 1965

TITAN GROUP, INC., a Delaware corporation (hereinafter called the "Company"), for value received, hereby promises to pay

**HAROLD FAGGEN**

or order, the principal sum of

**ONE HUNDRED THOUSAND DOLLARS ($100,000)**

in such coin or currency of the United States of America as at the time of payment (as hereinafter set forth) shall be legal tender for the payment of public and private debts, upon surrender hereof for payment in full at the principal office of the Company, 529 Fifth Avenue, New York, New York, and to pay interest on the unpaid principal hereof from the date hereof at the rate of 4% per annum, in like coin or currency, semi-annually on May 1 and November 1 of each year, until such principal sum shall have become due and payable, and to pay interest at the rate of 7% per annum on any overdue principal and (to the extent permitted by applicable law) on any overdue interest, from the due date thereof until the obligation of the Company with respect to the payment thereof shall be discharged.

This Note is one of a series of Notes designated Series A of the Company aggregating $3,000,000 in principal amount.

1. Payment of Principal.

The principal sum of this Note and all interest then accrued and unpaid shall become due and payable as follows:

November 1, 1970, 10% of the original face amount hereof.
November 1, 1971, 10% of the original face amount hereof.
November 1, 1972, 10% of the original face amount hereof.
November 1, 1973, 20% of the original face amount hereof.
November 1, 1974, 20% of the original face amount hereof.
November 1, 1975, the balance of the original face amount hereof.

Notwithstanding the foregoing, (a) if the Company shall (a) admit in writing its inability to pay its debts generally as they become due, (b) file a petition in bankruptcy or a petition to take advantage of any bankruptcy act, (c) make an assignment for the benefit of its creditors, (d) consent to the appointment of a receiver for itself or for the whole or any substantial part of its property, (e) on a petition in bankruptcy filed against it, be adjudicated a bankrupt, or (f) file a petition or answer seeking a reorganization or arrangement under the federal bankruptcy laws or any other applicable law or statute of the United States of America or any state thereof, or (g) if a court of competent jurisdiction shall enter an order, judgment or decree approving a petition filed against the Company seeking reorganization or arrangement of the Company under the federal bankruptcy laws or any other applicable law or statute of the United States of America or any state thereof, and such order, judgment or decree shall not be vacated or set aside or stayed within sixty days from the date of entry thereof, or (h) if, under the provisions of any other law for the relief or aid of debtors, any court of competent jurisdiction shall assume custody or control of the Company or of the whole or any substantial part of its property and such custody or control shall not be terminated or set aside or stayed within sixty days from the date of the assumption of such custody or control, or (i) if a receiver of the Company or of the whole or any substantial part of its property shall be appointed by any court of competent jurisdiction and shall not be discharged or the appointment shall not be vacated within sixty days after such appointment, then and in any such event the entire unpaid principal amount of this Note and all interest accrued thereon shall become immediately due and payable.

2. Register of Notes.

The Company or its duly appointed agent shall maintain a register or registers in which it shall register all of the Notes and all transfers thereof in accordance with the terms hereof. The Person shall be treated hereby as the owner of any Note registered on the register or registers maintained by the Company or its agent and the Company shall be entitled to record the registered holder as the actual holder of the Note as appointed for all purposes until a transfer has been effected by the Company or its agent. The Company or its agent shall not be required to make any transfers or exchanges of Notes for a period of 15 days next preceding the mailing of notice of redemption of any Notes. Any transfer of any Note shall be effected only and properly entered in the register upon surrender thereof by the registered holder thereof in person or by his attorney duly authorized in writing, with signature guaranteed by a bank of recognized standing and unless and until the registered holder shall have complied with the provisions hereof.

3. Prepayment.

The Company may not prepay any of the Notes, or any part thereof, prior to November 1, 1971. Thereafter, the Company, at its election, subject to the giving of notice as provided below, may prepay the principal amount of the outstanding Notes, in whole or in part, at the redemption premium set forth below plus interest accrued and unpaid to the date of prepayment.

| If Prepaid during the Twelve-Month Period Commencing November 1 | Prepayment Price (Percentage of Principal Amount) |
|---|---|
| 1971 | 105% |
| 1972 | 104% |
| 1973 | 103% |
| 1974 | 102% |
| 1975 | 101% |
| 1976 | 100% |
| 1977 | 100% |

Notwithstanding the foregoing, the Company shall have the option at any time prior to November 1, 1971, in the event of any merger or consolidation of the Company with or into, or the sale of substantially all of the assets of the Company to, or the acquisition of the Company by, any other corporation, to call for redemption any or all of such Notes at the principal amount thereof plus accrued interest to the date of redemption, upon the giving of notice as provided below, and upon the surrender of such Notes for redemption in accordance with said notice.

In the case of any prepayment of the Notes, a notice thereof shall be given not more than 60 days nor less than 30 days prior to the date fixed for such prepayment to the holders of the Notes at their last addresses appearing on the register of the Company. Any such notice may be given on behalf of the Company by its President, Executive Vice President or Secretary. Each such notice shall specify the date fixed for prepayment, the principal amount of the Notes to be prepaid, the interest to be paid on the prepayment date, the place where the Notes are to be surrendered for prepayment, and that on the prepayment date the unpaid principal amount of the Notes called for prepayment, together with interest accrued thereon to the prepayment date, will become due and payable. Notice having been given as aforesaid, the Notes so to be prepaid shall become due and payable on the prepayment date specified in such notice, and from and after such date (unless the Company shall default in the payment of the Notes) no interest shall accrue on the Notes so called for prepayment.

4. Conversion Privilege.

Any holder of any Note, at the option of such holder, may from time to time on or after [illegible] and prior to the close of business on the day before the Prepayment Date of the Note, or if the Note is called for redemption, then to the date fixed for redemption, convert such Note, or any portion of the principal amount thereof which is $100 or any multiple thereof, into fully paid and nonassessable shares of Common Stock of the Company (as such stock shall exist at the date of conversion) at the conversion price hereinafter stated, by surrendering such Note to be converted, with the form of conversion notice on the reverse hereof duly filled in and signed, at the principal office of the Company or at such other office or agency as the Company may designate in writing for such purpose, and upon payment to the Company by such holder in cash of the amount of any tax or duty payable in respect of any issue or delivery of shares of Common Stock on conversion of such Note prior to the delivery of certificates for such shares. Subject to and upon compliance with the provisions of this Paragraph 4, such conversion shall be effected by the delivery to the holder of such Note at the time of such surrender of certificates for the number of full shares of Common Stock issuable upon such conversion, together with cash in lieu of any fraction of a share as hereinafter provided. Such conversion shall be deemed to have been effected as of the close of business on the date on which such Note shall have been surrendered and such notice received by the Company as aforesaid, and the person or persons in whose name or names any certificate or certificates for shares of Common Stock shall be issuable upon such conversion shall be deemed to have become the holder or holders of record of the shares represented thereby at such time on such date and such conversion shall be at the conversion price in effect at such time on such date unless the stock transfer books of the Company are closed on such date, in which event such person or persons shall be deemed to have become such holder or holders of record at the close of business on the next succeeding day on which such stock transfer books are open, but such conversion shall be at the conversion price in effect on the date upon which such Note shall have been surrendered and such notice received by the Company as aforesaid.

The Company shall not be required to pay any tax or duty which may be payable in respect of any transfer involved in the issue and delivery of shares of Common Stock or other securities or property on conversion of Notes in a name other than that of the holder of the Note so converted, and shall not be required to issue or deliver such shares or certificates unless or until the person or persons requesting the issue thereof shall have paid to the Company the amount of such tax or duty, or shall have established to the satisfaction of the Company that such tax or duty has been paid.

The Company shall not be required to convert any Note while the stock transfer books of the Company are closed for any purpose, but any Note surrendered for conversion during any period while such books are closed shall be held by the Company until the next succeeding day on which such books are open, and such conversion shall be effected as of the close of business on such day.

In the event that any Note shall be converted pursuant to this Paragraph 4 subsequent to the close of business on the record date for the payment of interest thereon, such Note when surrendered for conversion must be accompanied by payment in cash of an amount equal to the interest thereon which is to be paid on the interest payment date. The holder of any Note shall forfeit no interest on any Note converted prior to the close of business on the record date for the payment of interest thereon.

The Company shall not be required to convert any Note if the conversion thereof would result in the issuance of a fraction of a share of Common Stock, except that the Company shall pay the cash value of any such fraction on the basis of the conversion price then in effect.

Within 10 days following the conversion of any Note, the Company shall issue and deliver to such person or persons entitled to receive the same a certificate or certificates for the number of full shares of Common Stock issuable upon such conversion, together with cash in lieu of any fraction of a share as hereinafter provided. The person or persons entitled to receive the Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such Common Stock on the close of business on the date on which such Note was surrendered for conversion, except that if such date is a date when the stock transfer books of the Company are closed for any purpose, such person or persons shall be treated as the record holder or holders of such Common Stock for all purposes on the next succeeding day on which such stock transfer books are open. No adjustment shall be made for any interest accrued on any Note converted or for any dividends on any Common Stock issued upon conversion.

The Company shall from time to time, as and when new shares of Common Stock or other securities or property are issuable upon conversion of the Notes, duly authorize, reserve and set apart sufficient shares of its Common Stock and such securities and property to effect conversion of all the Notes then outstanding. All shares of Common Stock delivered upon conversion of the Notes shall upon delivery be duly and validly issued and fully paid and nonassessable, free of all liens and charges and not subject to any preemptive rights. The Company shall not close its books against the transfer of Common Stock issued or issuable upon conversion of any of the Notes in any manner which interferes with the timely conversion of any Note. The Company shall assist and cooperate with any holder of Notes required to make any governmental filings or obtain any governmental approval prior to or in connection with any conversion of Notes hereunder (including, without limitation, making any filings required to be made by the Company).

The Company shall have reserved written notice of the proposed transfer, setting forth the circumstances and the proposed transfer price.

The Company shall have received a written notice from a bona fide underwriter to the Company specifying the number of shares of Common Stock which such underwriter proposes to purchase from the Company and the price at which such underwriter proposes to purchase such shares.

The Company shall have received

# EXHIBIT H, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN.

(H)

4/HAROLD FAGGEN ASSOCIATES INC.

| | | |

# EXHIBIT H, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

Hudson Fidelity Associates, Inc.

| Name | | Cert. | No | No. of Sh's | | |

HAROLD FAGGEN ASSOCIATES INC

| Name | CERT | No. | No. of Shs | | |
|---|---|---|---|---|---|
| General Motors Corp | A | 871-2265 | 100 | | |
| " | 1 | 482-001 | 100 | | |
| Johnson Electronic Industries | B | 205-937 | 100 | | |
| " | D | 204-093 | 100 | | |
| Hydrometer Inc. (Now Hydrometer Div of Esco) | CO | 12-2624 | 25 | | |
| " | CO | 17-2625 | 25 | | |
| " | No | 40357 | 50 | | |
| Household Finance Corp. | 3½ | 89961 | 100 | | |
| " | 3½ | 27-2627 | 100 | | |
| " | 3½ | 89-2628 | 100 | | |
| " | 3½ | 82-2625 | 100 | | |
| " | 3½ | 42-2626 | 25 | | |
| " | 3½ | 13-2596 | 25 | | |
| Inland Steel Co | N | 12-2594 | 100 | | |
| " | N | 31-2596 | 100 | | |
| " | N | 31-2597 | 100 | | |
| " | N | 31-2598 | 100 | | |
| " | N | 31-2599 | 100 | | |
| " | N | 31-2600 | 100 | | |
| Investors Mutual Inc of N.Y. | AM | 23-2453 | 295 | | |
| Mass Investors Trust | MU | 27-2624 | 11 | Received Jan 19 1965 from Custodian Bank Inc | |
| " | MC | 91-2625 | 100 | | |
| " | MC | 91-2626 | 100 | | |
| " | MC | 91-2627 | 100 | | |
| " | MC | 91-2628 | 100 | | |
| " | MC | 91-2629 | 100 | | |
| " | MC | 91-2630 | 100 | | |
| " | MC | 91-2631 | 100 | | |
| " | MC | 91-2632 | 100 | | |
| " | MC | 91-2633 | 100 | | |

EXHIBIT H, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

HAROLD FAGGEN ASSOCIATES INC

| NAME | CERT | No. | No. of Shs |
|---|---|---|---|
| ATT INDUSTRIES INC | NC | 7659 | 100 |
| de LEAR TRUCKING Co | NA | 52436 | 100 |
| | NA | 52437 | 100 |
| | NA | 52438 | 100 |
| | NA | 52439 | 100 |
| | NA | 52440 | 100 |
| | NA | 52441 | 100 |
| | NA | 52784 | 100 |
| | NA | 52785 | 100 |
| | NA | 52970 | 100 |
| SOUTHERN FINANCIAL CORP | YH | 18416/18518 | 10000 |
| MINNESOTA MINING & MFG Co. | NYL | 229330 | 50 |
| | NYL | 231917 | 50 |
| NATIONAL STEEL CORP | NH | 302548 | 100 |
| PACIFIC NORTHWEST BELL | ST | 211524 | 400 |
| PENN CENTRAL | SM | 245108 | 40 |
| | T | 277197 | 100 |
| | T | 277198 | 100 |
| | T | 277199 | 100 |
| | T | 279200 | 100 |
| | T | 277201 | 100 |
| PENNEY CORP | NYC | 27055/94 | 2000 |
| RADIO CORP OF AMERICA | S | 149395 | 100 |
| | S | 153141 | 100 |
| READING RAILROAD Co. | C | 435203 | 100 |
| | C | 435185 | 100 |
| | C | 438186 | 100 |
| | C | 373945 | 100 |
| REPUBLIC OIL CO INC. | SH | 504067 | 100 |
| | SH | 504068 | 100 |

RECEIVED JAN 10 1974
TITAN GROUP INC
BY

HAROLD FAGGEN ASSOCIATES INC

| NAME | | | CERT. | No. | No. of Shs | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| STERLING DRUG INC. | | | C | 39719 | 100 | ✓ | | | | | |
| " " " | | | C | 39720 | 100 | ✓ | | | | | |
| " " " | | | C | 401204 | 100 | ✓ | | | | | |
| " " " | | | CU | 41477 | 150 | ✓ | | | | | |
| TRI-CONTINENTAL CORP. | | | N | 41718 | 100 | ✓ | | | | | |
| " " " | | | N | 41719 | 100 | ✓ | | | | | |
| " " " | | | N | 41720 | 100 | ✓ | | | | | |
| " " " | | | N | 41721 | 100 | ✓ | | | | | |
| " " " | | | N | 41722 | 100 | ✓ | | | | | |
| " " " | | | N | 49783 | 100 | ✓ | | | | | |
| " " " | | | N | 49784 | 100 | ✓ | | | | | |
| " " " | | | N | 49785 | 100 | ✓ | | | | | |
| " " " | | | No | 4X971 | 36 | ✓ | | | | | |
| " " " | | | - | - | 14.182 | X | HELD BY DISCLOSED AGENT | | | | |
| TITAN GROUP INC. | | | NY | 76510/29 | 2000 | ✓ | | | | | |
| " " " | | | NY | 78206/16 | 1000 | ✓ | | | | | |
| UNION OIL OF CALIF. 6.50 | Conv Cv Pfd | | NP | 60611 | 100 | ✓ | | | | | |
| " " " | | | NP | 60612 | 100 | ✓ | | | | | |
| U.S. STEEL CORP. | | | U | 78017 | 100 | ✓ | | | | | |
| " " " | | | U | 78018 | 100 | ✓ | | | | | |
| " " " | | | U | 80649 | 100 | ✓ | | | | | |
| UNITED UTILITIES INC. | | | NCO | 4199 | 40 | ✓ | | | | | |
| " " " | | | CU | 10348 | 140 | ✓ | | | | | |
| " " " | | | NCO | X4278 | 44 | ✓ | | | | | |
| " " " | | | C | 54470 | 100 | ✓ | | | | | |
| " " " | | | C | 54471 | 100 | ✓ | | | | | |
| " " " | | | CU | 2181 | 200 | ✓ | | | | | |

RECEIVED JAN 10 1
TITAN GROUP INC
BY

EXHIBIT H, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN 105a

EXHIBIT H, ANNEXED TO AFFIDAVIT OF HAROLD FAGEN

ACTUARIAL TABULATING CORP

| NAME | CERT. No. | FACE VALUE OR No. OF SHS. | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| U.S. TREASURY NOTES 1½%, 4/1/69 | 1311 | 10000 | / | | | | | | |
| | 1314 | 10000 | / | | | | | | |
| | 1313 | 10000 | / | | | | | | |
| | 1304 | 10000 | / | | | | | | |
| | 1305 | 10000 | / | | | | | | |
| | 1106 | 10000 | / | | | | | | |
| | 1310 | 10000 | / | | | | | | |
| | 300 | 5000 | / | | | | | | |
| GENERAL FINANCE CO. - COM | CO 8049 | 76 | / | | | | | | |
| - $4.50 CONV PFD | CC 446 | 57 | / | | | | | | |
| DIAMOND INTL CORP | N 41456 | 100 | / | | | | | | |
| | N 41441 | 100 | / | | | | | | |
| FINANCIAL GENERAL CORP | C 29434 | 100 | / | | | | | | |
| | C 29433 | 100 | / | | | | | | |
| | C 29434 | 100 | / | | | | | | |
| | C 29435 | 100 | / | | | | | | |
| | C 29436 | 100 | / | | | | | | |
| | CW 17774 | 25 | / | | | | | | |
| | CO 41828 | 21 | / | | | | | | |
| | CO 40524 | 32 | / | | | | | | |
| | CO 70671 | 23 | / | | | | | | |
| FINANCIAL SECURITY CORP | JH 15 | 601 | / | | | | | | |
| INLAND STEEL | N 19840 | 100 | / | | | | | | |
| | N 144460 | 100 | / | | | | | | |
| | N 25[illegible]440 | 100 | / | | | | | | |
| THE LEHMAN CORP | AO 239766 | 43 | / | | | | | | |
| | AO 240450 | 44 | / | | | | | | |
| | AO 241264 | 42 | / | | | | | | |
| | AO 243309 | 43 | / | | | | | | |
| | AO 244306 | 6 | / | | | | | | |

RECEIVED JAN 10, 1969
TITAN GROUP INC
BY

# EXHIBIT H, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

| NAME | CERT. | NO. | NO. OF SHS. | | |

ACTUARIAL TABULATING CORP

| NAME | | | | CERT. | NO. | NO. OF SHS | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| TRI-CONTINENTAL CORP | | | | N | 18,175 | 100 ✓ | | | | | | |
| | | | | — | — | 152.18 ✓ HELD BY MERS TRUST CO - SEE NOTE | | | | | | |
| UNION OIL CO OF CALIFORNIA | $7.50 | COMM | MD | NP | 27402/9 | 200 ✓ | | | | | | |

RECEIVED JUN 10, 19[illegible]
TITAN GROUP INC
BY [illegible]

NOTE - TRI-CONTINENTAL CORP - MERS HAROLD TRUST CO, ACCTS FOR TRI-CONTINENTAL, IN ERROR, COMPRISES 100 SHS OF TRI CONTINENTAL CORP (SEE 2nd ACTUARIAL TABULATING CORP RETIREMENT PLAN WITH SHARES OWNED BY ACTUARIAL TABULATING CORP IN ACCOUNTING DIVISION INSURANCE CO) OF THE 152.18 SHARES HELD BY MERS HAROLD 12.30 SHARES BELONG TO THE RETIREMENT PLAN

# EXHIBIT H, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN

Received June 10 1968
Titan Group Inc
By

Endorsed Funds Services Corp.

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| U.S. Treasury Notes, 1½%, 4/69 | | | | Cert. No. | | Face Amt. No. of Sec. | | | |
| " | | | | 1307 | | 10000 | | | |
| " | | | | 1354 | | 10000 | | | |
| " | | | | 1373 | | 10000 | | | |
| " | | | | 457 | | 5000 | | | |
| " | | | | 296 | | 5000 | | | |
| " | | | | 431 | | 5000 | | | |
| " | | | | 521 | | 5000 | | | |
| Panhandle Oil & Refg Co. | | | | 172927 | Ctf | 100 | | | |
| " | | | | 211076 | Ctf | 41 | | | |
| " | | | | 76814 | Ctf | 100 | | | |
| " | | | | 270349 | Ctf | 41 | | | |
| Kansas Nebraska Gas Co | | | | 14232/6 | Nos | 200 | | | |
| Pacific Northwest Bell Tel Co. | | | | 40020 | Ctf | 100 | | | |
| " | | | | 41371/2 | Ctf | 200 | | | |
| " | | | | 42 2nd | Ctf | 100 | | | |
| " | | | | 47380 | Ctf | 100 | | | |
| " | | | | 136092 | Ctf | 100 | | | |
| " | | | | 18709 | Ctf | 43 | | | |
| " | | | | 24507 | Ctf | 15 | | | |
| Texas Corp | | | | XX12/89 | Ctf | 1000 | | | |
| Security Title & Guarantee Co | | | | 7945/7 | Nos | 500 | | | |
| " | | | | 8422/30 | Nos | 300 | | | |
| " | | | | 8435/9 | Nos | 200 | | | |
| Titan Group Inc | | | | 33146/52 | Nos | 200 | | | |
| Vic Contintental Corp | | | | 28425 | Ctf | 100 | | | |
| " | | | | 41763/4 | Nos | 200 | | | |
| " | | | | 42952 | Nos | 10 | | | |
| " | | | | - | - | 10,000 | Total as per Notes Attached Sheet | | |

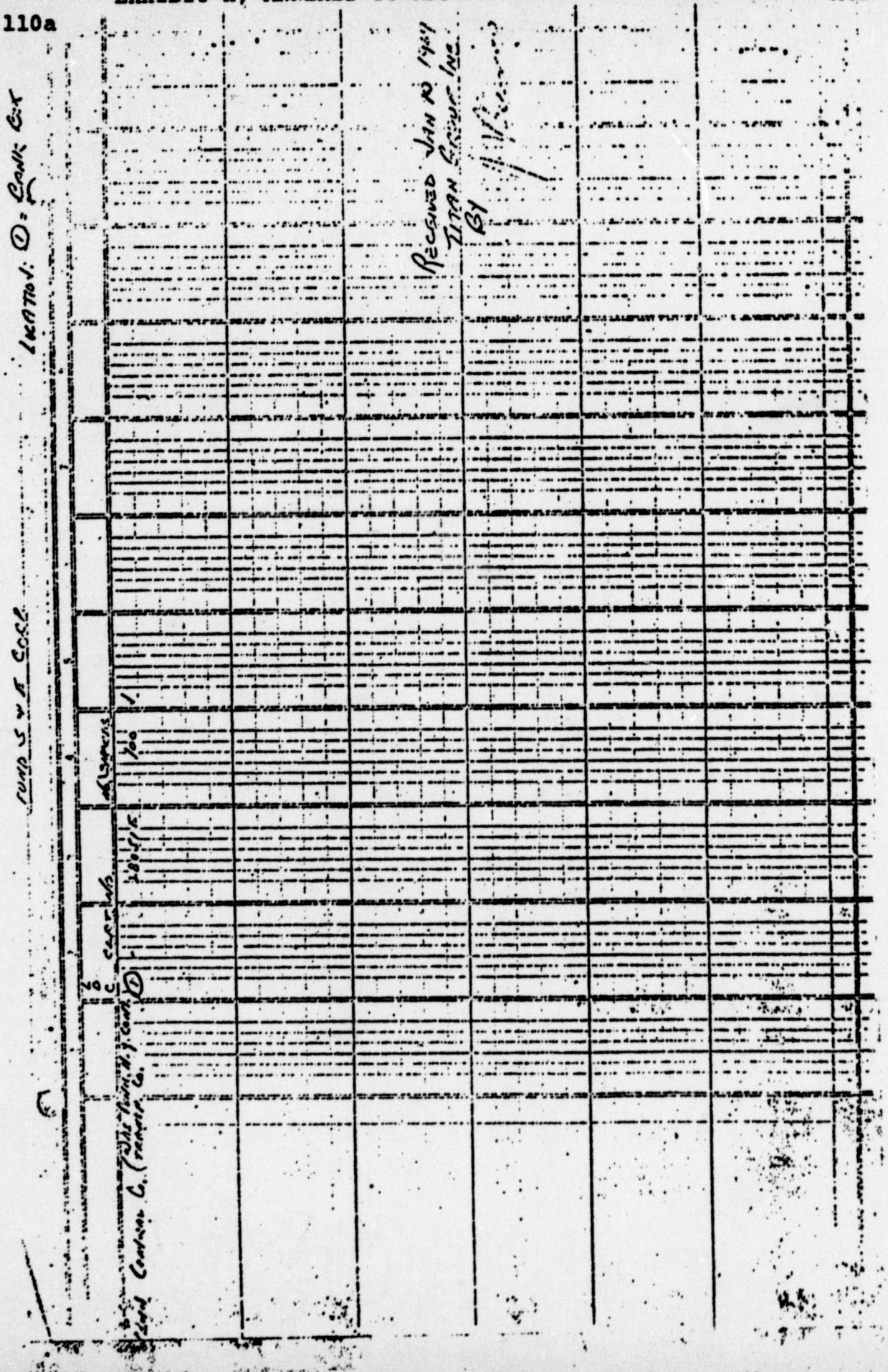


**EXHIBIT H, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN**

TITAN GROUP, INC.
[illegible] Avenue of the Stars, Century City
Los Angeles, California 90067
Telephone (213) 553 [illegible]

April 10, 1970

Robinson, Silverman, Pearce, Aronsohn & Sand
230 Park Avenue
New York, N.Y. 10017

Attention: Mr. Larry Spelman

Dear Larry:

This is to acknowledge that $1,500,000.00 of our Titan Group, Inc. 4% Convertible Installment Notes, dated October 1, 1969, due November 1, 1978, Series A, Numbers A20-11/25 payable to the order of Harold Faggen are valid and outstanding obligations of Titan Group, Inc. as of this date.

Very truly yours,

TITAN GROUP, INC.

Lester A. Kaufman
Vice President

LAK/jp

EXHIBIT I, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN.

Telegram

LC098

L LLE033 NL PDF XLT4502 LOS ANGELES CALIF MAR 25

LAWRENCE A SPELLMAN

250 PARK AVE, NYK

ZG

THIS IS TO ACKNOWLEDGE THAT $1,500,000.00 TITAN GROUP INC 4 PERCENT CONVERTABLE INSTALLMENT NOTES DATED OCTOBER 1 1969 DUE NOVEMBER 1 1979 SERIES A NUMBERS A20-11/25 PAYABLE TO THE ORDER OF HAROLD FAGGEN ARE VALID AND OUTSTANDING OBLIGATIONS OF TITAN GROUP INC AS OF THIS DATE

LESTER A KAUFMAN

1970 MAR 26 AM 5 12.

$1,500,000.00 4 1 1968 1 1979 A20-11/25.

CR-1201 (R5-62)

PLAINTIFF'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of witnesses and the exhibits attached thereto, and upon all of the proceedings heretofore had herein, the undersigned will make a cross-motion upon the argument of defendant's previously noticed motion, at the United States Court House, Room 506, Foley Square, in the City, County and State of New York, on September 26, 1972 at 10:00 o'clock A.M. for an order pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, granting plaintiff summary judgment on the first cause of action as to the issue of liability, with damages reserved for trial, and for summary judgment on the second cause of action, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
September 11, 1972

Yours, etc.

TO:

SHEIB, SHATZKIN & COOPER
Attorneys for Defendant
235 East 42nd Street
New York, N. Y. 10017

POWERS AND GROSS
By LAWRENCE M. POWERS
Attorneys for Plaintiff
Office and P. O. Address
110 East 59th Street
New York, N. Y. 10022
(212) 752-8004

AFFIDAVIT OF EDMUND M. KAUFMAN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND FOR INJUNCTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of California,

County of Los Angeles, ss:

EDMUND M. KAUFMAN, being duly sworn, deposes and says:

1. I am an attorney practicing in Los Angeles, California and a partner in the firm of Irell & Manella, specializing in taxation and corporate law. I am a principal witness in the above entitled matter, because I was involved in certain of the key negotiations for the acquisition of the Harold Faggen Companies which are the subject matter of this action. Neither I nor my firm is presently employed by Titan Group, Inc. ("Titan") as attorneys, and I do not hold any office in such corporation. I have told Titan that I expect to be paid for my time spent in reviewing my files and making this affidavit, at my normal hourly rates. My firm owns 10,000 shares of Titan stock taken in payment of attorneys' fees earned during the two year period prior to 1971. Except

as stated, I am totally removed from any professional or business relationship with Titan and have no personal interest in the outcome of this litigation.

*Nature of the Case*

2. This action by Titan seeks to recover damages, or obtain rescission, for securities fraud in connection with Titan's purchase of all the outstanding shares of four affiliated corporations owned and managed by Harold Faggen, the defendant. His four companies were Harold Faggen Associates, Inc., Actuarial Tabulating Corp., Employee Fund Services Corp. and Fund S & E Corp., and Harold Faggen also rendered personal services to and through these four corporations, the whole business being collectively referred to as the "Faggen Companies."

3. Titan claims that Harold Faggen misled me and the Board of Directors of Titan in the fall of 1968 into believing the Faggen Companies had pre-tax earning power of $571,000 in 1968, $452,000 in 1967, $491,000 in 1966 and $381,000 in 1965, if their actual earnings for those years were adjusted to the basis for computation of earnings for those years were adjusted to the basis for computation of earnings which was to prevail after the

acquisition. I am informed (see detailed accounting material in Hatcher affidavit) that the Faggen Companies never had such represented earning power and Harold Faggen's presentations of adjusted earnings grossly distorted the actual trend of earnings. I am further informed that based upon a recent attempt to audit the four represented years, that Mr. Faggen greatly exaggerated the actual earning power of the Faggen Companies. The magnitude of his overstatements of actual earnings are submitted in the Hatcher affidavit. The following sets forth the meetings, and the memoranda exchanged, between Faggen, me and the members of the Board of Titan, leading to our reliance on his written overstatements of earning power, together with the relevant occurrences after this transaction was closed in December 1968.

*Background of Titan*

4. Titan was formerly a real estate holding company named Futterman Corporation, which went public in or around 1960, trading in the over-the-counter market. Titan currently has sales exceeding $70 million annually and substantial earnings. Its principal business is construction and contracting services, and insurance and

financial services. Most of its real estate holdings have been liquidated in recent years. Titan currently has approximately 5,700,000 shares outstanding, in the hands of several thousand public shareholders. A copy of Titan's annual report for 1971 is annexed as Exhibit 1 indicating the scope of its business. Its founder and principal stockholder, Mr. Futterman, died in the early sixties and the corporation went through several changes of management. The management bringing the present action to set aside acquisition of the Faggen Companies was not in office in December, 1968, and this action represents an attempt by these executives (most of whom are large shareholders) to safeguard the interests of the corporation against what they believe to be a securities fraud practiced on it by Mr. Faggen.

5. In 1968, a group of individuals (headed by Gerald Block) based in Los Angeles, for whom I had previously acted as counsel, acquired a substantial position in Titan, and in due course took several seats on its Board. This group, investing through a limited partnership named Century City Investments, wherein I acted as general partner, and had a 1% interest, has since sold out its shares in Titan. In 1968 I acted as legal advisor to

this group and as special counsel to Titan, and participated actively in the negotiations leading up to the acquisition of the Faggen Companies. At the time of such acquisition, the Chairman of the Board of Titan was Benjamin M. Robinson, a practicing New York lawyer, whose participation in this transaction is further elaborated below. Mr. Robinson has been a director of Titan since 1960 and represented the Futterman estate, which sold its large bloc of stock to my clients and associates in Los Angeles. Mr. Robinson stayed on as Chairman of the Board throughout 1968 and (into 1972) as a director of Titan. The President of Titan in 1968 was Anthony M. Frank, from whom an affidavit as to certain of the facts described herein is also being supplied. Mr. Frank held office in Titan from March 1968 through tht end of 1969 and had been recommended by the Los Angeles group to become President and a director in 1968. I became a director of Titan in December, 1968, shortly after the acquisition of the Faggen Companies was closed, and became Chairman of the Board of Titan in April, 1969. The events leading up to the acquisition of the Faggen Companies, which are the subject matter of this law suit, occurred in the fall of 1968, when I had not yet been elected to

the Board, but was acting as special counsel in charge of certain acquisition negotiations on behalf of Titan.

*Negotiations Leading to Acquisition of Faggen Companies*

6. Throughout 1968, Benjamin M. Robinson, Senior Partner in the New York law firm of Robinson, Silverman, Pearce, Aronsohn, Sand & Berman, was Chairman of the Board of Titan. He had occupied such position at a substantial salary for a number of years and his law firm was also on retainer to Titan. At that time Titan was principally a real estate holding company, with substantial interests in office buildings, apartments, hotels and motels throughout the United States, and also owned an insurance brokerage firm. After some difficult times, Titan had begun seeking other acquisitions in various service fields, including insurance brokerage firms and related activities, in order to broaden the type of operations being conducted by Titan.

7. Benjamin Robinson recommended the acquisition of the Faggen Companies in the summer of 1968. He recommended such acquisition, because he stated he had known Harold Faggen for many years, and that a large part of

Mr. Robinson's practice consisted of advising various union pension funds on their operations and responsibilities to participating members, and that Harold Faggen and his companies were well regarded actuaries and consultants in this field. The minutes of Titan's Board meeting on July 29, 1968, supplied to me by Titan, are annexed as Exhibit 2, reflecting (on page 4) Mr. Robinson's recommendation of "* * * the possibility of acquiring Harold Faggen's company, an actuarial consulting service * * * which was owned 100% by a man he has known for many years." The negotiations began by Mr. Robinson introducing Harold Faggen to Anthony Frank, the President of Titan, to see if their personal relationship would permit an acquisition. After such meeting, as indicated in the Frank affidavit filed herewith, Mr. Robinson told Anthony Frank that he and Harold Faggen had "hit it off" and urged that Titan acquire the Faggen Companies. Mr. Frank met with defendant Faggen a few more times after the initial meeting and in due course Robinson stated to Frank that he thought Titan could make a deal to acquire the Faggen Companies.

8. In or about August, 1968, Mr. Robinson indicated to both Anthony Frank and to me that he had gotten

Harold Faggen to the point where "he was ready to take the steps and write up his company and tell its earnings" to the Titan management.

9. I was brought in at that point by Mr. Robinson and Mr. Frank, as special counsel, and by implication, as the representative of Titan's control group based in Los Angeles, who would have to be persuaded that the acquisition was worthwhile and that the price was reasonable. My first meeting with Harold Faggen took place in September, 1968 at Benjamin Robinson's law offices (with his partner Alan Aronsohn present) at 230 Park Avenue, New York City. By that time, the defendant Faggen had orally stated that the Faggen Companies had a current annual earning power of at least $550,000 before taxes. The level of earnings and the acquisition price to be paid for it was the essential subject for discussion at our first meeting. We also discussed details of Mr. Faggen's business. Annexed hereto as Exhibit 3 are my handwritten notes, written during this first meeting held on September 6, 1968. (I had kept these notes in my law firm's files and, on request, produced them for Titan late in 1971 when present management was investigating these negotiations.)

10. At this meeting in Mr. Robinson's offices, Mr. Faggen stressed that he had no problem getting 10 times pre-tax earnings for his company, and had been offered as much from John Diebold & Co. and was offered a similar earnings multiple from the Levin-Townsend Computer Service Corp. As page 1 of my notes shows (Exhibit 3), Faggen described the offers he received as follows:

> "offers from Diebold and Levin-Townsend for 10 times earnings + net worth (10 times *pre-tax*) an offer 7 - 7.5 million."

The total price of 7 to 7.5 million was based on the then $1.5 to $2 million net worth of the Faggen Companies and ten times the represented pre-tax earnings of at least $550,000. This earnings figure was the keystone of our whole discussion.

11. At this meeting Mr. Faggen requested a price consisting of 20 times his after-tax earnings (assuming usual corporate taxes of 50% this would translate to ten times pre-tax earnings of $550,000), plus the net worth of his companies. As page 2 of my notes made at the time shows (Exhibit 3), the

"deal proposed by Faggen is no less than 20 times earnings + Net Worth - with earnings excluding investment income."

The result of this pricing formula would have been $5.5 million based on the proposed multiple of earnings plus $1.5 to $2 million for net worth, leading to a payment of some $7.5 million in Titan securities for the Faggen Companies. Mr. Faggen initially wanted a tax free transaction which required an exchange of voting stock of Titan, valued at about $7.5 million for all the outstanding shares of the Faggen Companies. Mr. Frank and I did not want to give Faggen such a large bloc of stock, and at our next session I negotiated payment in convertible notes, as described below.

12. At the meeting I also discussed with Mr. Faggen the scope of his business, number of employees, competition, major accounts (all shown in my notes) and steps Mr. Faggen planned to take in the future, particularly the expansion of a newly formed computer service organization stemming from the computer services offered to the unions. At this first meeting with defendant Faggen, I was impressed with his expertise and with his financial

and investment sophistication in presenting the past and future of the Faggen Companies.

13. Harold Faggen, at the time of these negotiations, was approximately 57 years old and was a New York and Virginia certified public accountant, as well as a lawyer who had practiced in Virginia. He had practiced the accounting profession in New York City since the early 1940's. I was impressed by his knowledge of accounting and tax matters at our meeting. The strong recommendation of Benjamin Robinson that this acquisition be made was also based on the high degree of ability attributed to Harold Faggen in accounting and tax matters.

14. The foundation of this first meeting in September, 1968 was a single fundamental representation by Harold Faggen that the Faggen Companies had a pre-tax earning power in excess of $550,000 annually as of the fall of 1968. All the pricing discussions, all the suggestions as to how to value the deal and what alternative buyers Mr. Faggen had, were based upon this earning power representation. If the Faggen Companies did not have at least a $550,000 per year earning power, there would have been no such discussions as to $7 to $7.5 million in common stock, or any transaction near the magnitude

of the ultimate Faggen transaction involving $5.5 million in Titan notes in payment for the Faggen Companies.

15. A few weeks later, on October 2, 1968, I met with Harold Faggen in his offices in lower Manhattan to further negotiate the transaction. This meeting occurred after Ben Robinson told me to go negotiate the price down from $7.5 million myself, Robinson saying that he was too good a friend of Faggen's to engage in a negotiation with him. Our law firm's notes on this second discussion which resulted in the pricing of $5.5 million in convertible notes are also on page 2 of Exhibit 3. At this meeting Faggen and I shook hands on the fundamentals of the deal, all of which are listed in the notes made shortly after this meeting. The details were later changed somewhat when the contracts were written up, but the fundamentals did not change. As stated in my notes, the terms were

> "* * * 5 1/2 million at 4% semi-annually Subordinated, convertible 10 years * * *" (page 2, Exhibit 3).

The quoted notes of the conference on October 2, 1968 were dictated by me, when I returned to Los Angeles, to

my associate Richard Bernacchi, who wrote them down on page 2, Exhibit 3, in his handwriting, as working instructions for preparing the first draft of the contracts.

16. As I recall, either at the September meeting or in the interim between our September and October meetings, Mr. Faggen prepared in his own handwriting a June 30, 1968 balance sheet on the Faggen Companies, and a presentation of 1968 pre-tax income showing an ultimate result of $571,476, based on described adjustments. Before the October 2 meeting, Faggen delivered these statements to me, together with a copy of the tax return for his main corporation, Harold Faggen Associates, Inc., for the fiscal year ended June 30, 1968, to show the basis for the adjustments. These written representations, annexed as Exhibit 4 (including the tax return) were used to convince me at our October 2, 1968 meeting as to the earning power of the Faggen Companies.

17. Exhibit 4 was in my law firm files with my conference notes since October, 1968, and I supplied part of it to Titan late in 1971, and the balance recently, on request that I review my old Titan files in connection with their investigation. The document reveals earning calculations which Mr. Faggen used to convince me that

the Faggen Companies were earning substantially more than the "Net Per Return - $288,494" (See Exhibit 4, page 1, and Tax Return for 1967, item 28, annexed thereto), that is, more than the pre-tax earnings shown in the key tax return. After a list of adjustments which he set forth in detail for each corporation on these statements, he represented that instead of $288,494 in Harold Faggen Associates, Inc. and minimal earnings in the other three corporations, they were really earning a total of "$571,476" in 1968 (see total figure at bottom of page, Exhibit 4). These handwritten representations by Mr. Faggen, supplied with the tax return, were relied upon by me at that meeting in agreeing to the ten times earnings price of $5.5 million in Titan notes.

The analysis of adjustments he went through in Exhibit 4 further reveals what adjustments Faggen had in mind shortly thereafter when he wrote up the subsequent selling memorandum for the Board of Directors of Titan (the basis of this suit) which gave adjusted pre-tax earnings for 1968, as well as 1967, 1966 and 1965. Exhibit 1 to Titan's Complaint herein, the document sued upon (further discussed in detail below) shows virtually the identical adjusted income for 1968 - $571,262 - as was presented to me in Exhibit 4 - $571,476.

The remainder of that second negotiating session on October 2, 1968 dealt with my argument to Faggen that while a ten times pre-tax earnings price (or 20 times after tax) might be appropriate herein, in terms of value being paid to acquire service companies at that time, and considering the alternative offers Faggen said that he had, an additional payment for this net worth was not justified. I stated, in substance, that we expected to receive something more for our $5.5 million than future earning power alone, and the net worth had to be part of the package. Harold Faggen finally agreed to such concept and at the conclusion of the meeting we shook hands on a price of $5.5 million in convertible installment notes to be paid for the $571,000 in represented earning power of the Faggen Companies. From that point forward, October 2, 1968, the transaction was a matter of board approval and having his and Titan's attorneys draw the contracts and proceed to the closing of the business deal agreed upon. Our board approved the deal October 9, 1969 and announced it to the public that day. See Exhibit 6B, the release sent out by the corporation.

AFFIDAVIT OF EDMUND M. KAUFMAN

18. I have been asked to read Mr. Faggen's moving papers where he described the negotiations leading to acquisition of his companies. I note that he is completely silent about our two meetings, described in my annexed notes made at the time, which were the final negotiating sessions. He is also silent about delivering to me handwritten representations of adjustments from the key tax return which would yield $571,000 in earnings in 1968 (Exhibit 4). Mr. Faggen does admit in his moving papers that

> "Early in October, 1968, at a preliminary stage in our discussion, I [Faggen] provided a summary description of the business * * * which included a statement of income for the years 1964-1968 adjusted to reflect the elimination of expenses (with respect to such items as pension contributions, executive salaries, travel and entertainment expenses, etc.) that would not have been incurred if an acquisition had taken place in 1964" (page 3, Faggen's moving affidavit).

This "summary description" document, also handwritten by Mr. Faggen, is annexed as Exhibit 5A, and he admits in his affidavit that it "has been retyped (with some errors) and is attached to the complaint as Exhibit 1", i.e., the basis for this action. This handwritten document, when retyped (Exhibit 5B) was in turn relied upon by Titan's management when it approved the acquisition. Such document concededly delivered "early in October, 1968" was the direct follow-up to the 1968 income representation given to me in Exhibit 4, also in Faggen's handwriting, prior to our meeting on October 2, 1968, and both handwritten documents contain the same pre-tax earnings representation - $571,000. While there are slight differences between Exhibits 4 and 5A in income shuffled between his four wholly owned corporations, the *total* 1968 earning power, which was all we cared about, is the same, and that $571,000 figure in both documents was not accidental.

But the adjustments used by Mr. Faggen in October 1968 to increase 1968 earnings from $288,000 to $571,000 in Exhibit 4 are different from Mr. Faggen's adjustments offered in 1972. The "elimination of expenses (with respect to such items as pension contributions, executive

salaries, travel and entertainment expenses, etc.)" and the addition to "* * * historical net income figures [of] the difference between the projected salary and the amounts made in the past", as related in Faggen's 1972 affidavit (page 3) as the intended, *though unstated*, adjustments are only partially contained in the adjustments he supplied to me back in 1968. The adjustments in Exhibit 4 do not contain any additions to income for travel and entertainment expense reductions; except for Faggen himself, no reductions in future executive salaries are stated; and I don't know what items are embraced by "etc." in his present affidavit.

The upward adjustments to 1968 pre-tax income in Exhibit 4, which I read and relied upon when Faggen presented it to me in October 1968 are limited to (a) increases for state and city income taxes payable in 1968, (b) increases for salaries prepaid to executives through mid-1969 in certain corporations at the end of their fiscal year in 1968 (presumably to build up income tax deductions), (c) increases for pension prepayments (also to build up tax deductions), and (d) increases to accrue fees for "Accounting Services",

"Special Work in Process" and "Expense Items that will not recur." Exhibit 4 lists each such adjustment with precision. The adjustment items he now proffers in 1972 in general terms, with *no specific* statement of the items and amounts added in for 1968, nor for the previous three years, do not jibe with the specific adjustments I read and relied upon when he held out earning power of $571,000 annually.

Moreover, the 1968 represented earnings (in both Exhibits 4 and 5A and 5B) were a combination of cash and accrual earnings for the whole year, giving effect in October 1968 to anticipated transactions through the end of the year ("Advances for Services", "Special Work in Process", "Add Back State & City Income Taxes") and melding together earnings of four corporations with differing fiscal years, to present a picture to Titan of 1968 earning power on a pro-forma realistic basis. For his own reasons, Mr. Faggen's affidavit (page 4) now denies that accrual concepts underlay this presentation in Exhibit 5A, and by inference, its predecessor, Exhibit 4, for Mr. Faggen now says:

"The summary was not a restatement on an accrual basis, and was not represented to be such."

19. I am astonished at Mr. Faggen's lack of candor on these key disclosure documents - the numbers in them representing actual earning power are what made the deal. He does not even mention supplying Exhibit 4 to me which showed earnings of $571,000 for 1968, but it is here in his own handwriting. He refers to his obviously "bullish" selling memorandum in Exhibit 5A, showing the same $571,000 in earnings for 1968, as being furnished "at a preliminary stage in our discussion." But our meeting of October 2, 1968 was not "at a preliminary stage in our discussion"; it was the meeting at which the transaction was agreed upon!

On October 7, 1968, President Frank sent me a memorandum mentioning two minor changes Ben Robinson then negotiated with Faggen right after our commitment, saying "I told Ben we would go along with these two requests. We will try to obtain a letter from Harold to present to the Board meeting on Wednesday" (See Exhibit 5C).

AFFIDAVIT OF EDMUND M. KAUFMAN

Thereafter I am informed that the selling memorandum [the "letter from Harold"] was received by Chairman of the Board Robinson. The copy annexed hereto shows an acknowledgment of receipt in Robinson's handwriting (see top of Exhibit 5B), and shows that it also went to the President Anthony Frank. This selling memorandum requested on or about October 7 then formed the basis for approval of the acquisition by the Titan Board of Directors on October 9, 1968. The basic transaction was agreed upon *before* Mr. Faggen wrote up the selling memorandum sued upon herein, and his affidavit saying it was furnished at a preliminary stage is just not true.

Annexed hereto as Exhibit 6A are the minutes of the Titan Board meeting on October 9. The President (Anthony Frank, whose affidavit filed herewith corroborates these minutes) is quoted as follows:

> "He indicated that an agreement in principle had been reached with Mr. Faggen whereby he would receive convertible debentures totaling $5,500,000 with an interest rate of 4%
> * * * the terms of the debentures, premiums, etc. have to be worked out.
>
> * * *

> "The Board approved unanimously a motion to purchase these companies in accordance with the above terms subject to a final approval by the executive committee."

The resolutions on October 9 were the direct result of my agreement with Faggen on October 2. Both the agreement and the board resolution were based on the 1968 earnings of $571,000 shown in Exhibits 4 (prepared in September 1968) and 5A (prepared on or about October 7, 1968) in Faggen's handwriting, as well as the dependable earnings growth over the four years (generally related to me orally by Faggen) set forth in detail in Exhibit 5A. The sequence of these dated documents contradicts Mr. Faggen's affidavit.

20. If further proof be needed to show the selling memorandum led to definitive board action on this $5.5 million transaction, counsel have pointed out to me that the minutes reflect several of the details of the Faggen Companies presented in this write-up of his business. For example, the memorandum (Exhibits 5A and 5B) says:

> "The staff consists of 33 persons * * * sixteen employees have been on the staff for ten years or longer" (page 1, Exhibit 5B).

The corporate minutes track this language saying:

> "The Faggen organization employs an office force in excess of 30 people in its New York offices, of which 16 of the key employees have been with Mr. Faggen for over ten years" (page 4, Exhibit 6A).

Elsewhere the selling memorandum says:

> "Harold Faggen Associates, Inc. owns a number of pieces of IBM unit record equipment and leases an IBM Model 20 Computer * * *. Since we have both actuarial and computer capacity, we are in the process of programming completely automated pension plan calculations * * *. We expect to provide these services to stockholders, accountants and lawyers only" (Exhibit 5B, page 2).

Tracking the same disclosures, the minutes say:

> "The Faggen organization, through the use of a 360-20 IBM computer has available data banks on several million employees and expects

to expand into the computerization of actuarial processes which would be available for sale to insurance brokers and CPA's" (Exhibit 6A, page 3).

The selling memorandum prepared by Faggen was obviously a part of the presentation of this transaction to the Titan Board, was obtained from Faggen expressly for such purpose, and as confirmed by Anthony Frank's affidavit filed herewith, was duly relied upon in giving approval of the transaction. This memorandum led to board approval and the deal was announced to news media that day (See Exhibit 6B) at 5:45 P.M. in a release entitled "Titan Announces Plans to Acquire Group of Actuarial-Computer Companies."

21. This written memorandum (Exhibit 5A and 5B), which was in substance a selling memorandum prepared by Harold Faggen in his own handwriting, was consistent with the presentation of his earning power made in our conversations on the pricing formula for his companies described above. I went through the second conference (October 2) with Mr. Faggen supplied by him with the predecessor memorandum as to the earning power of the Faggen Companies for 1968 at $571,000 (Exhibit 4), with

information as to the upward trend over the four years, and negotiated a price based upon it. Exhibit 5B then submitted by Faggen to Robinson and Frank, and then to Titan's Board, merely repeated the earnings representations made to me. In addition, this memorandum (Exhibit 5A and 5B) contains a detailed year by year presentation of earning power indicating a continuing upward trend in earnings for the Faggen Companies, with a minor ($39,000) downturn in 1967, but with a substantial upward trend overall for the years 1965 through 1968 - progress from $380,000 to $571,000. In Mr. Faggen's words on page 3 of his memorandum:

> "As shown in Exhibit A attached, net profit before tax has been growing at a compound rate of approximately 15 percent a year."

22. The practical basis for Titan's reliance on these documents in October 1968 should be mentioned. I considered myself experienced in acquisition negotiations, having bought many privately-held companies for clients prior to this negotiation and knew that as a matter of practice, the owners of privately-held businesses followed the principle of minimizing income taxes. It was well-known to me and, undoubtedly to Chairman Ben Robinson

and President Anthony Frank, that privately-held companies seldom conveyed their true earning power or profitability in their published reports or federal tax returns. As we negotiated with Harold Faggen we were shown a 1967 tax return (fiscal year ending June 30, 1968) for his main corporation showing $288,494 in earnings, which was far below the $571,000 pre-tax earning power represented to exist in 1968. Mr. Faggen made it clear in our meetings that he had been minimizing taxes by several techniques. Exhibit 4 which he presented to me with a list of specific item and dollar adjustments was represented as the "true" earning power in 1968, engrafted on the tax return for the main corporation. For this same reason, the adjusted income figures annexed to his selling memorandum (which as shown were just a four-year expansion of the concepts of Exhibit 4), was a key reliance document, for it supplemented and corroborated what he had told us orally as to the fundamental earning power of the Faggen Companies. The following is the representation of earning power relied upon, as it appeared in Mr. Faggen's selling memorandum:

AFFIDAVIT OF EDMUND M. KAUFMAN

"(EXHIBIT A)

Net Income - Pre-Tax

Adjusted to basis which will

prevail after acquisition

(excludes investment income)

| | Fiscal Years Ending In: | | | |
|---|---|---|---|---|
| | 1965 | 1966 | 1967 | 1968 |
| Harold Faggen Associates, Inc. (June 30) | $253,357 | $367,087 | $332,192 | $430,596 |
| Actuarial Tabulating Corp. (March 31) | 59,878 | 60,976 | 59,201 | 65,806 |
| Employee Fund Services Corp. (Sept. 30) | 32,767 | 27,891 | 25,252 | 29,104 |
| Fund S & E Corp. (June 30) | ------- | ------- | ------- | ------- |
| Harold Faggen, Personal (Dec. 31) | 34,800 | 34,800 | 35,240 | 35,280 |
| Totals | $380,802 | $490,754 | $451,885 | $571,262" |

We understood Exhibit A (and its predecessor) of Faggen's selling memorandum to be a restating of the earnings of the Faggen Companies, on a combination cash and accrual basis for the four years, as contrasted with the cash basis for reporting income sometimes used by private corporations to defer taxes as long as possible (until cash was actually received), together with the adjustments which would

prevail after the acquisition was made. Notwithstanding Mr. Faggen's 1972 denial, he had to be making certain accrual adjustments for 1968, wherever relevant, in order to tell Titan the realistic earning power of his companies. To the extent that he did not state any differences between accrual and cash basis results, I had to assume they were not material differences. I was dealing with a careful professional and expected that his work product would be as precise and reliable as was indicated by his presenting earnings figures refined down to "$571,262".

Moreover, over a four year period, cash basis earning power should roughly equal accrual basis earning power, particularly where in the last year (1968) specific adjustments are made on an accrual basis to reflect any differences (See Faggen's adjustments in Exhibit 4). The longer time span should iron out differences between these two accounting methods which might occur at the end of a single year. Higher earnings in 1968, for example, could merely reflect cash flow from business booked late in 1967, suggesting regularity and steadiness in earning power over the four year time span. My measure of reliance and the measure of reliance of Chairman

of the Board Robinson, and President Frank, and other members of the Titan Board at the time, was particularly full and complete because of Harold Faggen's recognized expertise in accounting matters. This Exhibit 5A in his handwriting (and its predecessor Exhibit 4 furnished to me) was taken as a reliable, and carefully drawn, presentation of the true earning power of the Faggen Companies. We were not put on notice of the finely drawn distinctions between cash basis and accrual basis accounting he now makes, and if there were material differences, he was expected to disclose them. There was no one in the Faggen Companies capable of presenting this set of facts to us other than Harold Faggen, since he employed a small accounting firm, Joseph Warran & Co. who did not certify his annual audits or take any auditing responsibility for his financial statements. This, then, was a typical privately-held business being offered for acquisition to Titan, where our entire reliance was on the represented earning power "which will prevail after acquisition" submitted in writing by defendant Faggen as the person fully in control.

The affidavit of Mr. Hatcher, Titan's chief accounting officer, supplied separately on this motion, now

shows that the Faggen Companies never had the earning power represented. The Hatcher affidavit further shows that the overstatements of earnings for two of the earlier years were even more glaring than those for 1968, and that the growth trend year-to-year of operating earnings (excluding investment income) was greatly exaggerated for three succesive years. I further believe that the precipitous drop in earnings between the represented $571,000 in 1968 and the $260,000 in earnings in 1969 (see Hatcher affidavit) suggests that there were other adverse factors brewing in 1968, known to Faggen and undisclosed, which would have shown Titan that a precipitous drop in earnings would probably occur.

*Drafting of Contracts*

23. After the price of $5.5 million in notes was agreed upon on October 2, and the Board approved the deal a week later on October 9, 1968, Benjamin Robinson's office, as counsel for Titan, took over the handling of the legal aspects of this transaction. As I was based in Los Angeles, it seemed more economical for the law firm of Chairman of the Board, Robinson, to prepare the papers and close the transaction. I did supply a first

draft of the contract, at Robinson's request, prepared by my firm in Los Angeles. This draft was completed October 21, 1968, copies of its first few pages are annexed as Exhibit 7, and it was mailed to the Robinson firm who forwarded it on to Mr. Faggen's counsel, Simon Sheib, on October 23, 1968. (Exhibit 8 is the covering letter of October 23 from Michael Rosen of Mr. Robinson's firm to Simon Sheib.)

As further documentary evidence of our belief in and reliance on Faggen's represented earning power at that time, Exhibit 9 shows a draft letter to Titan shareholders, prepared by President Frank's office, for our nine-month earnings report. On this draft announcement describing the Faggen acquisition, I wrote in (around October 23, 1968):

> "The actuarial and computer companies have net cash and liquid assets of more than $1.5 million and operating income for their most recent fiscal year *in excess of $550,000 before taxes*" (my handwriting on page 2, Exhibit 9).

The nine-month report ultimately mailed did not, however, contain this detailed language.

24. As mentioned earlier, the Robinson law firm had dealt extensively with Faggen over many years as attorneys for the various pension plans where he acted as actuarial consultant. At the time of the negotiations in 1968 the close relationship of Benjamin Robinson to Harold Faggen was considered a positive factor. In substance, Mr. Robinson, as Chairman of the Board of Titan, was vouching for the business ability and accounting integrity of C.P.A. Harold Faggen. Mr. Robinson, I am informed, even helped Faggen select counsel, recommending Simon Sheib who was now known to Mr. Faggen previously. Robinson's vouching for defendant Faggen played a substantial part in my reliance upon Mr. Faggen's unaudited presentation of net income, "adjusted to basis which would prevail after acquisition", and justified Titan, through the Robinson law firm, completing this acquisition based on Mr. Faggen's oral and written assurances as to earning power.

25. As the Robinson firm exchanged drafts on the contract with Faggen's attorney, Simon Sheib, I was apprised of certain insubstantial changes in the legal mechanics of this transaction (See Exhibit 10, a letter to me of November 8, 1968 from Robinson's office forwarding

revisions, where the attorney says "The principal change in the structure of the Agreement, as distinguished from its substance is the omission of a separate contract and closing * * *"). In connection with the contracts prepared by the Robinson firm, a set of financial statements were ultimately obtained and incorporated by reference into the contracts. These financial statements were supplied late in October by Joseph Warren & Co. under date of November 25, 1968 and the transaction closed a week later on December 2, 1968. The Joseph Warren & Co. financial statements which were incorporated by reference into the contracts were supplied to the management of Titan just before the closing, but Joseph Warren's main income statement (for Harold Faggen Associates, Inc.) was the same tax return for the year ending June 30, 1968 that Faggen had already supplied to me in September as part of Exhibit 4. This key disclosure of the earnings base was nothing new and did not supercede the expansion from that base set forth in Exhibits 4 and 5A. There was also nothing we did not already have in the balance sheet as of September 30, 1968. The pricing of the transaction and the basic reliance documents were the Statement of Net Income - Pre-Tax (Exhibit 5A

and its predecessor Exhibit 4) which Faggen prepared and upon which all of us relied as the represented earning power of the Faggen Companies. The overall upward trend of earnings over the four-year period was very material (as related in Exhibit 5A) to the decision to buy Faggen at all, and the final pricing element to the deal was the $571,000 represented earning power for 1968 contained in these two documents.

The Joseph Warren accounting statements received after the negotiations were over were substantially disregarded for several reasons: First, these accounting statements of Joseph Warren & Co. stated that they were *unaudited* "prepared from your [Faggen's] books and records without independent verification thereof, and because of the change in accounting method described above, we are unable to express an opinion with respect thereto." (See Exhibit 11, Warren's form cover letter on all the statements.) Thus they were no more reliable than anything Faggen said in writing. Second, Joseph Warren & Co. expressly stated on the face of these statements as of November 25, 1968 that they should not be relied upon, since,

AFFIDAVIT OF EDMUND M. KAUFMAN

> "The statement of income and expenses does not properly reflect the earnings for the period. The income is overstated because and to the extend that the opening balances on an accrual basis have not been taken into account" (Exhibit 11).

Obviously, there was nothing here that Titan could rely upon, and it was so instructed by Joseph Warren & Co. as agent for Harold Faggen. Moreover, with respect to income of the corporations, they were not the usual form of profit and loss accounting statements; they were just tax returns. I already had had the key tax return (since September, 1968) for the main corporation's year ended June 30, 1968 (part of Exhibit 4), and the adjustments which built up to $571,000 pre-tax earnings were all based on the $288,494 starting point contained in this tax return. What we were relying upon was the additional unaudited presentation by Harold Faggen himself, upon which the pricing of this whole transaction was based. The income statements included in the Warren financial statements were merely Xerox copies of the corporations' tax returns for the years involved (See Exhibit C, to Faggen

affidavit), and we knew from our own experience, and Harold Faggen had expressly stated to us, that he had been minimizing reported income for years in order to minimize taxes on his operations. In substance, Joseph Warren & Co. was saying "Don't depend on us" and Mr. Faggen was saying, "Depend on me".

26. The redraft on the contracts was transferred between Mr. Robinson's firm and myself during November as the transaction moved toward completion, but the basic business transaction, as announced, was not changed. See our announcement to Titan shareholders on December 3, 1969 reporting "the consummation of the previously announced agreement" (Exhibit 9B). The essential transaction which I had personally negotiated with Harold Faggen on October 2 was unchanged by the legal documentation.

*Steps Taken After Closing of Transaction*

27. After this transaction was closed in December, 1968, Titan took over all the shares of the Faggen Companies in exchange for $5.5 million in convertible notes plus an additional $42,410 by a short-term note ultimately paid to Faggen. Faggen was recommended by Robinson as a

nominee for the Board of Directors of Titan and became a director of Titan serving in 1969 through April, 1972, as a Titan director. Faggen and I were elected to the Board at the same meeting on December 12, 1969. Exhibit 12 attached shows how promptly, and with what complete faith, Mr. Faggen was made an insider in Titan after the closing. In the summer of 1969, Faggen, along with Robinson, became a member of Titan's Executive Committee. However, after the acquisition closed, minor tensions developed over Faggen's desire to continue his absolute control over accounting matters in the Faggen Companies. Faggen refused to permit the Peat, Marwick & Mitchell firm to do the year-end audit of his books, reiterating a prior view that they competed with his pension fund advisory services and would obtain his trade secrets if permitted to audit him. The Joseph Warren firm had been handling the books without audit through September 30, 1968, and they were permitted to do the year-end work-up and supply their conclusions to the Peat, Marwich & Mitchell firm for overall certification of the Titan group. This unusual approach was acceded to in the first blush of cooperative effort with a newly acquired company.

Thus, Titan *never* did itself make an audit for 1968 of the books of the Faggen Companies, notwithstanding Mr. Faggen's contrary assertion (page 5) in his affidavit. Titan accepted the report of the Joseph Warren firm at year-end and incorporated it into Titan's overall reports for 1968. I am informed by Titan's present management that the work papers of the Warren firm were retained during this period and made available to Titan's accountants, even for the last three months of 1968, with great reluctance, and with little opportunity for independent verification. Titan did not make any audit for the year 1968 nor for the prior years 1967, 1966 or 1965, which had been the subject matter of Mr. Faggen's representations. No audit was made for these years while I was connected with Titan and I am informed no audit was thereafter made until April, 1972, just prior to bringing this action, because of Faggen's and Warren's unwillingness to release the prior years' records. Titan's home office never obtained actual possession of the ledgers - the raw data - until 1972. Mr. Hatcher's affidavit herein shows me to what lengths Mr. Faggen went to hold on to these records down to the bringing of this action.

28. When Titan allowed Faggen to control his accounting in 1969, Titan, of course, had no way of knowing how much smaller the actual earning power of the Faggen Companies was than that represented. The year-end report prepared by Joseph Warren & Co. for 1968 could only give effect to the tax planning and income minimizing devices of Faggen which continued after the closing in December, 1968, and the adjustments could not be reflected in 1968 income. Moreover, Faggen vehemently resisted our putting another financial executive in to oversee his operations, refusing even to talk to the man I chose to go into his closely guarded domain. See my letter to director Faggen on August 12, 1969, trying to gain more cooperation,

> "he [the executive Johnson] may be considerably handicapped with respect to our present actuarial operations insofar as you feel that as a matter of principle you cannot talk to him" (p. 2, Exhibit 13).

A careful reading of Exhibit 13 in its entirety conveys the atmosphere of my dealings and problems with Mr. Faggen.

AFFIDAVIT OF EDMUND M. KAUFMAN

The first dependable data from which one could question the reliability of the $571,000 in pre-tax earning power represented by Faggen did not come in until after 1969, when a full year of operations on an accrual basis with the "adjustments" had been completed, and the adjusted earning power of the Faggen Companies could reveal itself. In the year ended December 31, 1969, I am informed that the Faggen Companies earned only $260,000 (pre-tax), as contrasted with the represented earning power in 1968 of $571,000, a 60% drop. This year-end earnings report became known to Titan in or about April, 1970, when the annual audit was completed by its auditing firm. But of course, at that time both Harold Faggen and Benjamin Robinson were active members of the Board of Directors of Titan and members of the Executive Committee, and when director Faggen was asked about the substantial downturn in his business he had lengthy "explanations" to supply on the subject, emphasizing the unanticipated expense of expanding his computer service division. There was no suggestion of fraud at the time and he had been successful (without a showdown over corporate authority) in keeping home office executives out of his division. At worst I assumed Faggen was suffering from a temporary problem from this expansion.

AFFIDAVIT OF EDMUND M. KAUFMAN

29. By early 1970, earnings of many companies were turning downward, and Titan itself was beset with problems of a most serious nature. We had made several additional acquisitions in the year following the Faggen acquisition and had year-end operating problems and capital shortages in many divisions of the company. At that time as Chairman of the Board I was dealing with earnings downturns in many places in Titan and we were having problems with the management of many acquired companies who needed more operating capital and who were unhappy at the result of their acquisition because the Titan Common Stock which they had received had fallen dramatically in market value. The balance of 1970 was a bitter year for Titan as it was for many companies in the construction and real estate field. I accepted Mr. Faggen's explanations in 1970 for the substantial downturn in earnings of his companies as part of the general distressed business conditions of the time, and was not aware of particular problems which might tie into misrepresentations at the inception of this transaction back in October, 1968.

By the end of 1970 a substantial internal reorganization was under way in Titan. There were three

successive chief executive officers in Titan during 1970, after I resigned as chief executive in mid-year. Persons whose companies had been acquired in the preceding year and a half were complaining of the problems in Titan, some of them wished to take their companies back and several insisted that new Titan management was required. By the end of 1970 a whole new Board was proposed and I ultimately resigned as Chairman, and later from the Board entirely. Several major stockholders whose companies had been acquired by Titan took over management. One of these major stockholders was Robert James Frankel, who held more than 10% of the outstanding common stock of Titan and who had been operating our New York based heavy construction company, Sovereign Construction Company, Ltd., without active involvement in Titan's overall operations. He became Chairman of the Board and Chief Executive Officer at the beginning of 1971. Mr. Frankel's affidavit as to his investigation of the Faggen acquisition late in 1971 and 1972 is separately submitted.

30. In the year ended December 31, 1970, I am informed that earnings in the Faggen Companies fell again, earning only $192,000 pre-tax, less than the amount necessary to cover annual interest costs of their

acquisition, and barely 30% of the $571,000 represented earnings. The $5.5 million in notes bore interest at a rate of 4% annually, i.e., $220,000 annually in interest requirements. But the audited 1970 earnings figure was not determined until the spring of 1971 and at that time I was out of Titan entirely, followed by my clients and business associates in Los Angeles disposing of all of their stock holdings in Titan. The lack of earning power in the Faggen Companies became a problem for the new management of Titan. In early 1971, when Robert James Frankel took over as Chairman of the Board of Titan, he and I were engaged in a bitter dispute over certain management decisions made at the time of my tenure and sums owing to me and my law firm by Titan at the termination of our relationship. As these disputes were ultimately compromised and settled, with less than complete amity, Mr. Frankel made detailed inquiries of me late in 1971 as to what happened with the Faggen Companies and why they weren't earning more money with such a substantial price in debt securities having been paid for them. I could not give a satisfactory answer to this question.

31. At this juncture in 1971, Mr. Frankel as head of the new management team began his own investigation

of the Faggen Companies acquisition, and after many months of negotiation and legal study this lawsuit resulted. That set of facts in 1971 and 1972 is presumably detailed in Mr. Frankel's affidavit. After I resigned I did nothing more than answer questions and search my files late in 1971, and later in more detail, in preparation of this affidavit in July, 1972.

*Conclusion*

The written earnings statements by Mr. Faggen in Exhibits 4 and 5A and 5B were the basis for the price agreed upon. The fallacious and misleading accounting underlying those statements are the subject of the Hatcher affidavit submitted herewith. I am a busy California lawyer uninvolved with Titan, whose offices are now based in New Jersey and Kentucky, and I would like nothing better than not to be involved as a witness herein. But the notes and documents in my files are relevant and I have supplied them with, I believe, a full explanation of the conversations surrounding them. Reviewing all the factual material supplied to me by Titan's counsel, restudying the sequence of documented

events, and weighing the secretiveness of Mr. Faggen in the years following his acquisition, I now sincerely believe that the defendant misled me and misled the other persons in Titan's management who relied on his stated earning power.

(Sworn to by Edmund M. Kaufman, August 11, 1972.)

EXHIBIT 1B, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

TITAN GROUP, INC.
529 FIFTH AVENUE, NEW YORK, N.Y. 10017 ☐ TELEPHONE (212) MO 1-3232

August 12, 1969

LOS ANGELES OFFICE
2800 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90057
(213) 386-7544

Mr. Harold Faggen
Harold Faggen Associates, Inc.
853 Broadway
New York, New York 10003

Dear Harold:

I am in receipt of your letter to me dated August 5, 1969 together with a copy of your letter to John Spence dated August 6, 1969, the latter dealing with your corrections of minutes for the Board meeting held June 12, 1969.

I have the following comments:

1. If you would like to discuss the Preliminary Draft which I sent you on July 25, 1969, I suggest you contact its author.

2. I was not aware that your negative vote with respect to the employment of Mr. Johnson extended to determining his compensation. My recollection is that the compensation package, with specific reference to the sale of shares to Mr. Johnson and the granting of stock options, was considered separately. If, however, you wish to correct the minutes to reflect a negative vote on the compensation package, I see no reason why that cannot be accomplished. I take it your point is that having employed him, we should insist on his serving without compensation.

3. I assume that the "two principal officers" of your organization who objected to Mr. Johnson were yourself and Miss Dogan. In any case, please let me know and we will incorporate into the minutes the names of the specific officers who objected. It is true that

EXHIBIT 1B, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN



in the face of "this objection", I recommended that Mr. Johnson nevertheless be employed primarily so as to obtain his valuable assistance in the insurance agency operations. I have no recollection of, and no intention of and do not now intend, any limitation on Mr. Johnson's employment insofar as the Financial Services Group is concerned. The resolution in fact adopted proposed Mr. Johnson as a Group Vice President in charge of Financial Services. Your desire not to communicate with Mr. Johnson is one which you have explained at great length to me. Although I wish the contrary were true, I apparently have no ability to impose his services upon you. From the executive management point of view, we are nonetheless looking to Mr. Johnson for long range development of the entire Financial Services Group although admittedly he may be considerably handicapped with respect to our present actuarial operations insofar as you feel that as a matter of principle you cannot talk to him.

I presume that you will agree that it is management's prerogative to call upon services of those upon whom it chooses to rely. Harold, I do not wish to engage in game playing. We have a responsibility to the Board of Directors and to the stockholders to exercise our best judgment for the long range good of the company. There will be times when one or another of us will disagree with actions proposed and taken but I cannot abide a situation where any one of us has a veto power over the actions of the Board and of management as a whole. This is not the U. N. Security Council. Each of us will have to learn to live with decisions with which we disagree.

Cordially,

TITAN GROUP, INC.

Edmund M. Kaufman
Chairman of the Board

EMK:yk

cc: Mr. Anthony M. Frank
Mr. John C. Spence
Benjamin M. Robinson, Esq.

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

Minutes of the meeting of the Board of Directors of Titan Group, Inc. held on July 29, 1968 at the office of the corporation, 529 Fifth Avenue, New York, New York, at 2:00 P.M.

PRESENT:

Leonard Casey
Alfred M. Frager
Anthony M. Frank
Rosalie Futterman Casco
Kurt H. Grunebaum
Eugene A. Hegy, Jr.
Richard K. McIntyre
Benjamin M. Robinson
James A. Russell

ABSENT:

Samuel N. Bergman

Benjamin M. Robinson acted as Chairman of the meeting and Richard K. McIntyre as Secretary thereof. The Secretary presented to the meeting a copy of the notice thereof that had been sent by telegram or delivered by hand to each director together with an affidavit relating thereto. The Chairman directed that said notice and affidavit be filed with the minutes of the meeting.

Mr. Frank then reported in detail on each of the company's investments indicating his ideas as to the future possibilities of each and then presented to the Board with his comments the operational figures for the six months ended June 30, 1968.

The Treasurer announced that in connection with the renovation work being done at the Dupont Plaza Hotel in Washington, D. C. the Corporation had been called upon to guaranty the construction contract entered into by its subsidiary, Futterman Dupont, Inc., for a price of approximately $250,000 plus

any authorized extras. Whereupon, after discussion the execution and delivery of said guaranty was ratified, confirmed and approved.

The Treasurer then announced that Sky Host Inn, a partnership of which the Corporation's subsidiary Futterman Atlanta Corporation holds a 29% interest, borrowed the sum of $43,750 from The First National Bank of Atlanta in order to make the final payment upon the purchase of the fee interest of the land and this Corporation along with the partners I. T. Cohen and Ben Kohler jointly and severally guaranteed said loan. Whereupon, after discussion the execution and delivery of said guaranty was ratified, confirmed and approved.

The Treasurer next announced that the $1,000,000 loan transaction with The Exchange National Bank of Chicago had been consummated and subordinate mortgages held by the Corporation or its subsidiaries on several properties were pledged to the Bank as security. The rate of interest is 7-1/4% per annum (subject to increase if the prime rate increases), principal payments of $25,000 are payable quarterly and the loan matures in three years. Whereupon, after discussion said loan transaction was ratified, confirmed and approved and the Corporation was authorized to execute and deliver such further documents in connection with the pledging of said subordinate mortgages as the Bank's attorneys may reasonably request.

The President announced that the sale by the Corporation's subsidiary, Futterman Marine Drive Corporation, of its one-half interest in Imperial Towers at a purchase price of $1,925,000, subject to closing adjustments and payment of brokerage, to be consummated as of July 31, 1968 and said transaction was ratified, confirmed and approved.

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

Mr. Frank then discussed in detail the economic future of certain investment properties presently in the company's portfolio which he felt warranted a full scale management review of their present economic values in relation to the book values of such properties with a view toward the possibility of setting aside appropriate reserves on the balance sheet of the Corporation in amounts that would properly reflect the true value of these investments. The Board indicated that such a study should be undertaken and a future report be made to the Board of the action taken by management regarding the valuation of certain properties.

Mr. Frank then reported to the Board on the proposed sale of the shopping center division in furtherance of his memorandum of July 19, 1968 to the members of the Board.

The Treasurer noted that in some cases it might be advisable to sell the stock of the subsidiaries owning the shopping centers rather than to convey the assets. A lengthy discussion then ensued regarding this transaction including the possible uses of the cash proceeds and the administrative savings to be effected. Whereupon, after motion duly made and seconded the following resolution was unanimously adopted:

> RESOLVED, that the President be, and he hereby is, authorized to enter into a contract (or contracts) with First National Real Estate Trust and/or United Investors Corporation, or their nominee, for the sale of the six (6) shopping centers owned by the Corporation and its subsidiaries at a total purchase price of $4,500,000 cash over mortgages, subject to closing adjustments, and upon such other terms and conditions as the President may approve;
>
> RESOLVED, that any one or more of said contracts may, in the discretion of the President, be in the form of a sale of the stock of the subsidiary corporation owning title to the shopping center, in which event the Corporation shall give the purchaser the customary guaranty against undisclosed liabilities; and

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

RESOLVED, that upon the execution of said contracts the President or any Vice President be, and each of them hereby is, authorized to execute deeds to said properties (or transfers of the stock of subsidiaries in the event of stock transactions) and such other documents as may be necessary or desirable to consummate said contracts, and the Secretary or any Assistant Secretary shall be authorized to certify to the effect of the foregoing resolutions to any title company or other proper party interested in said transaction.

The Board then discussed in detail the proposal made by Mr. Bergman to sell his 20% interest in the insurance division to Titan. After analyzing the past profits and anticipating the future, the Board felt that such an acquisition should be negotiated with various safeguards including a proviso that the underwriting business of a subsidiary to Bergman & Lefkow, that is, Bergman's Exchange Agency, should have a limited scope of endeavor so as to protect against losses such as were incurred in the Compass underwriting activities on the West Coast. The Board felt that a continued participation in any losses that developed subsequent to the purchase of the agency but which were applicable to the period prior to said purchase had to be shared by the seller on a 20/80 ratio. Additionally, it was felt that if such a purchase was effected, the underwriting exposure would have to be substantially reduced if not eliminated. Therefore, upon the general terms and conditions outlined, the Board authorized Mr. Frank to meet with Mr. Bergman and attempt to negotiate the purchase of Mr. Bergman's interest for the Corporation and that the purchase in its final terms and conditions be subject to the approval of the Executive Committee.

The Chairman then discussed the possibility of acquiring Harold Faggen's Company, an actuarial consulting service to pension funds and welfare

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

programs, which was owned 100% by a man that he has known for many years. Mr. Robinson indicated that Mr. Frank and he had met several times with Mr. Faggen and that a possibility of an acquisition exists. The Board advised that discussions continue.

There being no other business to come before the meeting it was thereupon adjourned at 5:00 P.M.

Richard K. McGuire

SECRETARY

166a - Hagglen Arg

Conf. Sta Al Anderson & Harold Faggen 9-6-61

Affiliates Harold Faggen Associates, Inc.
249 - 813 Broadway, N.Y. 10003

Consulting actuaries - for all kinds of pension plans except the "valuing" area of plans
trusteed plans - funded, but generally not
by insurance - by & large, there are
Union Funds

often. one old firm Anderson & Anderson was folded)

Merrill, Lynch has original an actuarial firm
Wakeman -
Kwiat - planned original an Individuals firm
often. 30+ employees
sil. actuarial staff - 5
consulting staff - 8

Mr. Faggen is sole stockholder of all cos. - except
for trust for children which own small part
of one co.

person to be engaged - to attend at risks of
design co - or firms. person to visit
material corporation.

Co. has no organization designed to get firm business -
often. - time first client comes in the door

Offices for Detroit & Kwiat - planned for
for 10 times employees + part with 2 pub. time
one often. 6-7-7.5 million

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

annual federal returns:

ITU is largest — est. to earn thru $100,000 per yr.
2-4 others range from $50-70,000 per yr.

B

last published by Faggen is at no less than
20 times earnings + N.W —
w/ earnings each. incr. incrs

---

Conf. with Faggen & Frank 10-2-68

IRS is pretty current 6-30-67 (C'65 not yet filed)
thru '66 unaudited, '64 & '65 only audited

Have recent earnings problem — so far justified
relative to possible problem of computers, etc.—

(1) More than one company (NY)
(2) will liquidate - 364 D(2)
(3) 5½ million at 4%
semi-annual
Subord, conv.
10 yrs
10% payable in 5th yr.
Callable in 3 yrs 10-63
105, 10% — ———
limited anti-dilution
(See foreign language pages)
Limited purchase — register
debentures for purpose
of allowing underwriters
to sell underlying stock.

to include put for

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

Adjustments

| | | | | | |
|---|---|---|---|---|---|
| Net for Return | | | | | 288,494 |
| Realized Investment Income | | | | | 3,935 |
| | | | | | 256,589 |
| Old Bad Debt Reserve Balance Credit to Income | | | | | 14,520 |
| | | | | | 271,409 |
| Loans Allowance - (Loan at 6/30/58) | | | | 25,700 | |
| Reserve Assignment | | | | 58,108 | |
| Balance of 12/31/58 (Can be treated Loans) | | | | | |
| Reserve for | | | | 2,950 | |
| | | | | 13,162 | |
| | | | | 119,920 | 119,920 |
| | | | | | 391,329 |

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

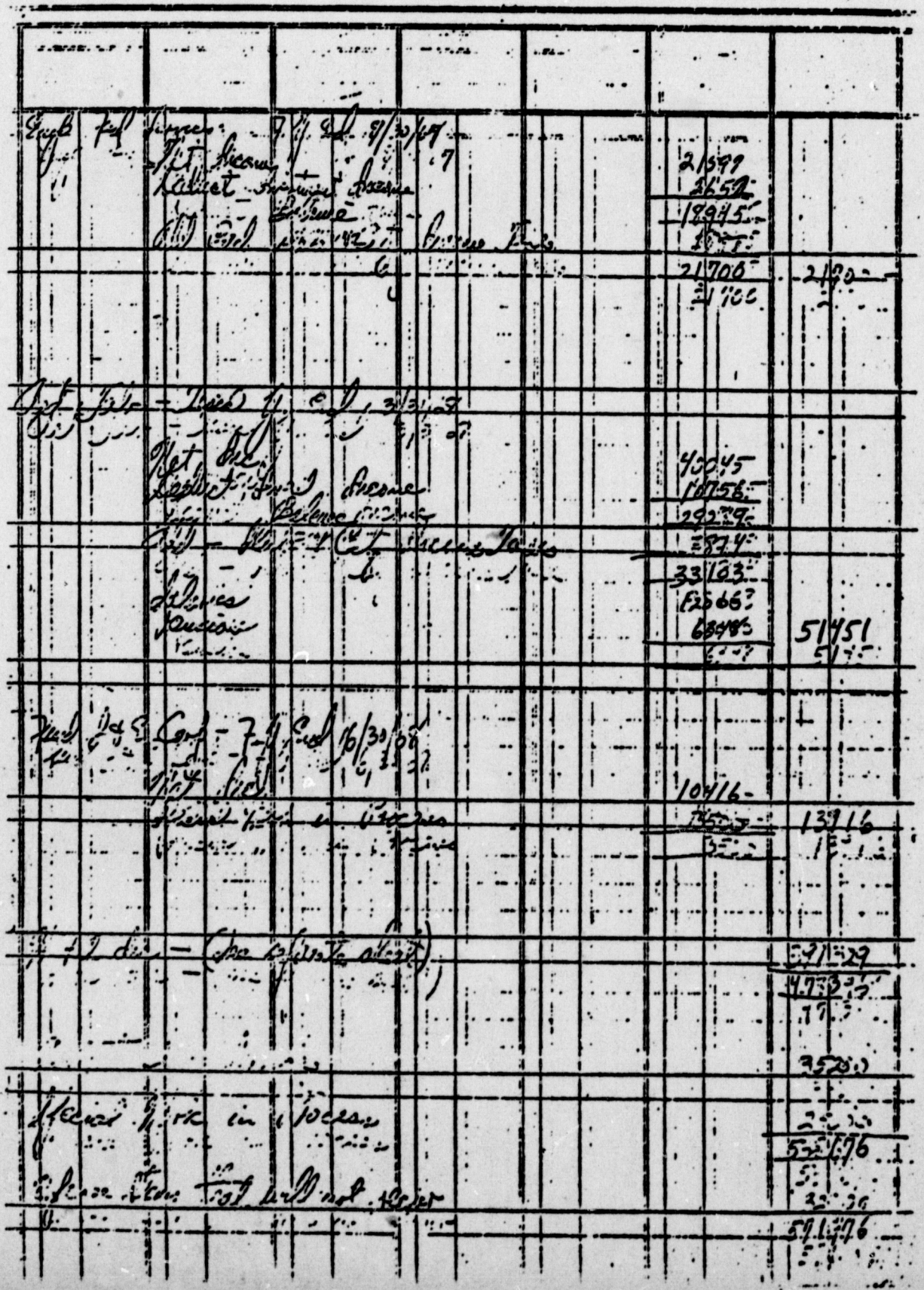


EXHIBIT 4, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

Adjustments

| | | | | | | |
|---|---|---|---|---|---|---|
| Stat. Fed. Net Income | | | | | 288494 | |
| Deduct Investment Income | | | | | 31905 | |
| | | | | | 256589 | |
| Add Back - Gift & C.G. Income Tax | | | | | 14820 | |
| | | | | | 271409 | |
| Prior Adjustment - (Loan at 6/30/67) | | | | 25700 | | |
| Prior Assignment | | | | 58108 | | |
| Balance 6/30 12/31/68 (Can be Statistic Loans) | | | | | | |
| | Rose | | | 22950 | | |
| | Fox | | | 13162 | | |
| | | | | 119920 | 119920 | |
| | | | | | 391329 | |

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

Form **1120** — **U.S. Corporation Income Tax Return** — **1967**

U.S. Treasury Department — Internal Revenue Service

For calendar year 1967 or other taxable year beginning July 1, 1967, ending June 30, 19 68

(PLEASE TYPE OR PRINT)

Check if a — A Init. prep. return ☐ or personal holding company ☐ electing under section 1361 to be taxed as a corporation. B Consolidated return ☐ C Personal Holding Co. ☐

D Business Code No. (see instr.) 5098

F County in which located: New York

G Enter total assets from line 14, column (d), Schedule L (see instruction H) $ 877,394.50

IMPORTANT—All applicable lines and schedules must be filled in. If the lines on the schedules are not sufficient, see instruction M.

| | | | |
|---|---|---|---|
| GROSS INCOME | 1 | Gross receipts or gross sales ____ Less: Returns and allowances ____ | 918,819.54 |
| | 2 | Less: Cost of goods sold (Schedule A) and/or operations (attach schedule) | |
| | 3 | Gross profit | 918,819.54 |
| | 4 | Dividends (Schedule C) | 12,639.04 |
| | 5 | Interest on obligations of the United States and U.S. instrumentalities | 750.00 |
| | 6 | Other interest | 3,717.91 |
| | 7 | Gross rents | |
| | 8 | Gross royalties | |
| | 9 | Net gains (losses)—(separate Schedule D) | 14,719.60 |
| | 10 | Other income (attach schedule) | |
| | 11 | TOTAL income—Add lines 3 through 10 | 950,725.09 |
| DEDUCTIONS | 12 | Compensation of officers (Schedule E) | 147,985.00 |
| | 13 | Salaries and wages (not deducted elsewhere) | 279,235.54 |
| | 14 | Repairs (do not include capital expenditures) | |
| | 15 | Bad debts (Schedule F if reserve method is used) | |
| | 16 | Rents | |
| | 17 | Taxes (attach schedule) | 26,699.97 |
| | 18 | Interest | |
| | 19 | Contributions (attach schedule—see instructions for limitation) | |
| | 20 | Casualty or theft losses (attach schedule) | |
| | 21 | Amortization (attach schedule) | |
| | 22 | Depreciation (Schedule G) | 6,372.11 |
| | 23 | Depletion (attach schedule) | |
| | 24 | Advertising | |
| | 25 | (a) Pension, profit-sharing, stock bonus, annuity plans (attach Form 2950) | 58,108.00 |
| | | (b) Other employee benefit plans (see instructions) WELFARE | 2,679.96 |
| | 26 | Other deductions (attach schedule) | 140,017.39 |
| | 27 | TOTAL deductions on lines 12 through 26 | 662,230.96 |
| | 28 | Taxable income before net operating loss deduction and special deductions (line 11 less line 27) | 288,494.13 |
| | 29 | Less: (a) Net operating loss deduction (see instructions—attach schedule) ____ (b) Special deductions (Schedule I) 10,743.18 | 10,743.18 |
| | 30 | Taxable income (line 28 less line 29) | 277,750.95 |
| TAX | 31 | TOTAL income tax (Schedule J) | 138,648.85 |
| | 32 | Credits: (a) Tax deposited—Form 7004 application for extension (attach copy) ____ (b) 1967 estimated tax payments (include 1966 overpayment allowed as a credit) ____ (c) Credit from regulated investment companies (attach Form 2439) ____ (d) Credit for U.S. tax on nonhighway gas and lube oil (attach Form 4136) | |
| | 33 | If tax (line 31) is larger than credits (line 32), the balance is TAX DUE. See instr. G for Tax Deposit System → | 138,648.85 |
| | 34 | If tax (line 31) is less than credits (line 32) . . . . . Enter the OVERPAYMENT here → | |
| | 35 | Enter amount of line 34 you want: Credited to 1968 estimated tax ____ Refunded ____ | |

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

CORPORATE SEAL

Date ____ Signature of officer ____ Title ____

Date ____ Individual or firm signature of preparer ____ Address ____

# EXHIBIT 4, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

Form 1120 (1967)

Page 2

## Schedule A—COST OF GOODS SOLD (See instructions 2)

| | |
|---|---|
| 1 Inventory at beginning of year | |
| 2 Merchandise bought for manufacture or sale | |
| 3 Salaries and wages | |
| 4 Other costs (attach schedule) | |
| 5 Total | |
| 6 Less inventory at end of year | |
| 7 Cost of goods sold—Enter on line 2, page 1 | |

Method of inventory valuation

## Schedule C—DIVIDENDS (See instruction 4)

| | |
|---|---|
| 1 Domestic corporations subject to 85% deduction | 12,247.01 |
| 2 Certain preferred stock of public utilities | |
| 3 Foreign corporations subject to 85% deduction | |
| 4 Dividends from wholly owned foreign subsidiaries subject to 100% deduction (section 245(b)) | |
| 5 Other dividends from foreign corporations | |
| 6 Income from controlled foreign corporations (attach Form 3646) | |
| 7 Foreign dividend gross-up (section 78) | |
| 8 Qualifying dividends from affiliated groups (section 243(b)) | |
| 9 Other | |
| 10 Total—Enter here and on line 4, page 1 | 12,247.01 |

## Schedule E—COMPENSATION OF OFFICERS (See instruction 12)

| 1. Name, address, and social security number of officer | 2. Title | 3. Time devoted to business | 4. Percent of corporation stock owned: Common | 4. Percent of corporation stock owned: Preferred | 5. Amount of compensation | 7. Expense account allowances |
|---|---|---|---|---|---|---|
| HAROLD [redacted] ROSE GEORGE | CHAIRMAN | | | | 75,700.00 | |
| | PRES. | | | | 45,900.00 | |
| | SEC-TREAS | | | | 26,325.00 | |
| | | | | | | |
| | | | | | | |
| | | | | | | |

Total compensation of officers—Enter here and on line 12, page 1 . . . . . 147,925.00

## Schedule F—BAD DEBTS—RESERVE METHOD (See instruction 10)

| 1. Year | 2. Trade notes and accounts receivable outstanding at end of year | 3. Sales on account | Amount added to reserve: 4. Current year's provision | Amount added to reserve: 5. Recoveries | 6. Amount charged against reserve | 7. Reserve for bad debts at end of year |
|---|---|---|---|---|---|---|
| 1962 | | | | | | |
| 1963 | | | | | | |
| 1964 | | | | | | |
| 1965 | | | | | | |
| 1966 | | | | | | |
| 1967 | | | | | | |

## Schedule G—DEPRECIATION (See instructions for Schedule G)

Taxpayers using Revenue Procedures 62-21 and 65-13: Make no entry in column 2, enter the cost or other basis of assets held at end of year in column 3, and enter the accumulated depreciation at end of year in column 4.

| 1. Class and subclass class of depreciable property | 2. Date acquired | 3. Cost or other basis | 4. Depreciation allowed or allowable in prior years | 5. Method of computing depreciation | 6. Life or rate | 7. Depreciation for this year |
|---|---|---|---|---|---|---|
| 1 Total additional first-year depreciation (do not include items below) | | | | | | |
| Buildings | | | | | | |
| Furniture and fixtures | VAR | 10,747.21 | 4,995.08 | VAR | 10% | 751.79 |
| Transportation equipment | VAR | 12,043.00 | 5,809.89 | VAR | VAR | 2967.00 |
| Machinery and other equipment | | | | | | |
| Other (specify) | | | | | | |
| SEALED MACHINES | VAR | 32,021.97 | 17,004.41 | VAR | VAR | 3,122.81 |
| AIR CONDITIONERS | VAR | 5,009.59 | 4,347.96 | VAR | VAR | 30.31 |
| LEASEHOLD IMPROVEMENTS | VAR | 21,156.17 | 21,156.17 | | | — |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| 2 Totals | | 82,977.94 | | | | 6,972.11 |
| 3 Less amount of depreciation claimed in Schedule A and elsewhere on return | | | | | | — |
| 4 Balance—Enter here and on line 22, page 1 | | | | | | 6,972.11 |

## Schedule H—SUMMARY OF DEPRECIATION

| | Straight line | Declining balance | Sum of the years-digits | Units of production | Additional first-year (section 179) | Other (specify) | Total |
|---|---|---|---|---|---|---|---|
| 1 Under Rev. Procs. 62-21 and 65-13 | | | | | | | |
| 2 Other | 2,794.88 | 4087.23 | | | | | 6,972.11 |

(20—66) Lessee

# EXHIBIT 4, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

Form 1120 (1967) Page 2

## Schedule I—SPECIAL DEDUCTIONS

| | |
|---|---|
| 1 (a) 85 percent of line 1, Schedule C | 10,742.19 |
| (b) 85.208 percent of line 2, Schedule C | |
| (c) 85 percent of line 3, Schedule C | |
| (d) 100 percent of line 4, Schedule C | |
| 2 Total—Not to exceed 85 percent of (line 28, page 1, less the sum of lines 3 and 5 of this schedule). The 85-percent limitation does not apply to a year in which a net operating loss occurs | 10,742.19 |
| 3 100 percent of line 5, Schedule C | |
| 4 Dividends paid on certain preferred stock of public utilities (see instructions in case of net operating loss) | |
| 5 Western Hemisphere trade corporations (not allowable in year of net operating loss) | |
| 6 Total special deductions—Add lines 2 through 5. Enter here and on line 29(a), page 1 | 10,742.19 |

## Schedule J—TAX COMPUTATION

| | |
|---|---|
| 1 Taxable income (line 30, page 1) | |
| 2 Surtax exemption (line 1, $25,000, or amount apportioned under section 1561, whichever is lesser) | |
| 3 Line 1 less line 2 | |
| 4 (a) 22 percent of line 1 | |
| (b) 26 percent of line 3 | |
| (c) If multiple surtax exemption is elected under section 1562, enter 6 percent of line 2 | |
| 5 Income tax (line 4, or line 26 of separate Schedule D, whichever is lesser) | 130,497.08 |
| 6 Foreign tax credit (attach Form 1118) | |
| 7 Line 5 less line 6 | 130,497.08 |
| 8 Investment credit (attach Form 3468) | 2,348.23 |
| 9 Line 7 less line 8 | 128,148.85 |
| 10 Personal holding company tax (attach Schedule PH) | |
| 11 Tax from recomputing prior year investment credit (attach computation) | |
| 12 Total tax—Add lines 9, 10, and 11. Enter here and on line 31, page 1 | 128,148.85 |

H Date incorporated 5-21-56

I (1) Did the corporation at the end of the taxable year own directly or indirectly 50 percent or more of the voting stock of a domestic corporation? Yes ☐ No ☐

(2) Did any corporation, individual, partnership, trust, or association at the end of the taxable year own directly or indirectly 50 percent or more of the corporation's voting stock? Yes ☐ No ☐
(For rules of attribution, see section 267(c).)

If the answer to (1) or (2) is "Yes," attach a schedule showing:
(a) name, address, and identifying number; and
(b) percentage owned.

If the answer to (1) above is "Yes," include the taxable income (or loss) from line 30, page 1, Form 1120 of such corporation for the taxable year ending with or within your taxable year.

J Did you have any contracts or subcontracts subject to the Renegotiation Act of 1951? Yes ☐ No ☒
If "Yes," enter the aggregate gross dollar amount billed during the year

K Amount of taxable income (or loss) from line 30, page 1, Form 1120 for: 1964 [illegible] 1965 [illegible] 1966 [illegible]

L Did you claim a deduction for expenses connected with:
(1) A hunting lodge ☐, working ranch or farm ☐, fishing camp ☐, resort property ☐, pleasure boat or yacht ☐, or other similar facility ☐? (Other than where the operation of the facility was the principal business.) Yes ☐ No ☒
(2) The leasing, renting, or ownership of a hotel room or suite ☐, apartment ☐, or other dwelling ☐, which was used by customers or employees or members of their families? (Other than use by employees while in business travel status.) Yes ☐ No ☒
(3) The attendance of your employees' families at conventions or business meetings? Yes ☐ No ☒
(4) Vacations for employees or members of their families? (Other than amount reported on Form W-2.) Yes ☐ No ☒

M Refer to page 7 of instructions and state the
Principal business activity ACCOUNTING CONSULTANTS
Principal product or service

N Were you a member of a controlled group subject to the provisions of section 1561 Yes ☐ No ☒, or section 1562? Yes ☒ No ☐
If "Yes," check type of relationship:
(1) parent-subsidiary ☐
(2) brother-sister ☒
(3) combination of (1) and (2) ☐ (See section 1563)

O Were you liable for filing Forms 1096 and 1099 or 1087 for the calendar year 1967? Yes ☒ No ☐
If "Yes," where were they filed? [illegible]

P Was there any substantial change in the manner of determining quantities, costs, or valuations between opening and closing inventory? Yes ☐ No ☐
If "Yes," attach explanation.

Q Did you pay dividends during the taxable year which you considered to be partially or wholly nontaxable to shareholders? Yes ☐ No ☐ (See sections 301 and 316.) If this is a consolidated return, answer here for parent corporation and on Form 851, "Affiliations Schedule," for each subsidiary.

R Were you a U.S. shareholder of any controlled foreign corporation? Yes ☐ No ☒ (See sections 951 and 957.) If "Yes," attach Form 5471 for each such corporation.

# EXHIBIT 4, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

Form 1120 (1967) — Schedule L—BALANCE SHEETS — Page 4

| ASSETS | Beginning of tax year (a) Amount | Beginning of tax year (b) Total | End of tax year (c) Amount | End of tax year (d) Total |
|---|---|---|---|---|
| 1 Cash | | | | |
| 2 Trade notes and accounts receivable | | | | |
| (a) Less allowance for bad debts | | | | |
| 3 Inventories | | | | |
| 4 Gov't obligations: (a) U.S. and instrumentalities | | | | |
| (b) State, subdivisions thereof, etc. | | | | |
| 5 Other current assets (attach schedule) | | | | |
| 6 Loans to stockholders | | | | |
| 7 Mortgage and real estate loans | | | | |
| 8 Other investments (attach schedule) | | | | |
| 9 Buildings and other fixed depreciable assets | | | | |
| (a) Less accumulated depreciation | | | | |
| 10 Depletable assets | | | | |
| (a) Less accumulated depletion | | | | |
| 11 Land (net of any amortization) | | | | |
| 12 Intangible assets (amortizable only) | | | | |
| (a) Less accumulated amortization | | | | |
| 13 Other assets (attach schedule) | | | | |
| 14 Total assets | | | | |
| **LIABILITIES AND CAPITAL** | | | | |
| 15 Accounts payable | | | | |
| 16 Mtges., notes, bonds payable in less than 1 yr. | | | | |
| 17 Other current liabilities (attach schedule) | | | | |
| 18 Loans from stockholders | | | | |
| 19 Mtges., notes, bonds payable in 1 yr. or more | | | | |
| 20 Other liabilities (attach schedule) | | | | |
| 21 Capital stock: (a) Preferred stock | | | | |
| (b) Common stock | | | | |
| 22 Paid-in or capital surplus (attach reconciliation) | | | | |
| 23 Retained earnings—Appropriated (attach sch.) | | | | |
| 24 Retained earnings—Unappropriated | | | | |
| 25 Less cost of treasury stock | | | | |
| 26 Total liabilities and capital | | | | |

**Schedule M-1—RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN**

| | | | |
|---|---|---|---|
| 1 Net income per books | | 7 Income recorded on books this year not included in this return (itemize) | |
| 2 Federal income tax | | (a) Tax-exempt interest $ | |
| 3 Excess of capital losses over capital gains | | | |
| 4 Taxable income not recorded on books this year (itemize) | | | |
| | | 8 Deductions in this tax return not charged against book income this year (itemize) | |
| 5 Expenses recorded on books this year not deducted in this return (itemize) | | (a) Depreciation . . $ | |
| (a) Depreciation . . $ | | (b) Depletion . . $ | |
| (b) Depletion . . $ | | | |
| | | 9 Total of lines 7 and 8 | |
| 6 Total of lines 1 through 5 | | 10 Income (line 28, page 1)—line 6 less 9 | |

**Schedule M-2—ANALYSIS OF UNAPPROPRIATED RETAINED EARNINGS PER BOOKS (line 24, page 4)**

| | | | |
|---|---|---|---|
| 1 Balance at beginning of year | | 5 Distributions: (a) Cash | |
| 2 Net income per books | | (b) Stock | |
| 3 Other increases (itemize) | | (c) Property | |
| | | 6 Other decreases (itemize) | |
| | | 7 Total of lines 5 and 6 | |
| 4 Total of lines 1, 2, and 3 | | 8 Balance at end of year (line 4 less 7) | |

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

[redacted]

YEAR ENDED JUNE 30, 1968

| | | |
|---|---|---|
| **TAXES** | | |
| PAYROLL TAXES | | 10,493.37 |
| N.Y.C. COMMERCIAL RENT & OCCUPANCY | | 1,202.48 |
| N.Y.S. FRANCHISE | | 1,276.05 |
| N.Y.C. CORPORATION | | 9,541.27 |
| N.Y.S. SALES | | 182.00 |
| | | $ 22,699.97 |
| **OTHER DEDUCTIONS** | | |
| RENT & MAINTENANCE | | $ 29,851.68 |
| ELECTRICITY | | 2,799.51 |
| PROMOTION | | 1,420.26 |
| PUBLIC SUBSCRIPTIONS | | 262.50 |
| TELEPHONE & TELEGRAPH | | 5,922.91 |
| OFFICE MACHINES - RENTAL & MAINTENANCE | | 2,155.10 |
| STATIONERY, PRINTING & POSTAGE | | 26,405.32 |
| TRAVEL EXPENSE | | 10,413.91 |
| ENTERTAINMENT EXPENSE | | 12,388.84 |
| AUTO EXPENSES | | 4,457.57 |
| GIFTS & CHRISTMAS EXPENSE | | 5,261.41 |
| PROFESSIONAL FEES | | 4,500.00 |
| INSURANCE | | 4,218.49 |
| STAFF LUNCHES, DINNERS & MEETINGS | | 1,675.37 |
| MOVING OF MACHINES & SHIPPING CHARGES | | 642.57 |
| RESEARCH EXPENSE | | 634.57 |
| CONVENTION EXPENSES | | 1,044.27 |
| EDUCATIONAL STUDIES | | 1,148.00 |
| SUNDRY EXPENSES | | 2,771.51 |
| | | $ 140,017.48 |
| **TAX COMPUTATION** | | |
| ALTERNATIVE TAX - SCHEDULE P | | $ 14,478.68 |
| 10% SURCHARGE | $ 12,478.68 | |
| SURCHARGE APPORTIONED FOR YEAR 1/1 - 6/30/68 182/366 x 12,478.68 .497267759 | | 6,205.25 |
| | | $ 130,992.05 |

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

SCHEDULE D (Form 1120)
U.S. Treasury Department
Internal Revenue Service

# Gains and Losses From Sales or Exchanges of Property

1967

[redacted]

PART I—ORDINARY GAINS AND LOSSES FROM DISPOSITION OF DEPRECIABLE PROPERTY UNDER SECTIONS 1245 AND 1250—Assets Held More Than 6 Months—Where double headings appear, use the first heading for section 1245 and the second heading for section 1250.

| a. Kind of property (If necessary, attach statement of descriptive details not shown below—refer to 1245 or 1250 to indicate type of asset) | b. Date acquired (mo., day, yr.) | c. Date sold (mo., day, yr.) | d. Gross sales price | e. Cost or other basis, cost of subsequent improvements (if not purchased, attach certificate) and expense of sale |
|---|---|---|---|---|
| 1 | | | | |
| | | | | |
| | | | | |

| f. Depreciation allowed (or allowable) since acquisition | | g. Adjusted basis (e less sum of f-1 and f-2) | h. Total gain (d less g) | i. Ordinary gain (lesser of f-1 or h) OR (see instructions) | j. Other gain (h less i) |
|---|---|---|---|---|---|
| f-1. Prior to January 1, 1962 OR Prior to January 1, 1964 | f-2. After December 31, 1961 OR After December 31, 1963 | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| 2 Total ordinary gain. Enter here and on line 11 and identify as gain from Part I | | | | | |
| 3 Total other gain. Enter here and on line 4 and identify as gain from Part I | | | | | |

PART II—SALE OR EXCHANGE OF PROPERTY UNDER SECTION 1231

| a. Kind of property (If necessary, attach statement of descriptive details not shown below) | b. Date acquired (mo., day, yr.) | c. Date sold (mo., day, yr.) | d. Gross sales price | e. Depreciation allowed (or allowable) since acquisition | f. Cost or other basis, cost of subsequent improvements (if not purchased attach explanation) and expense of sale | g. Gain or loss (d plus e less f) |
|---|---|---|---|---|---|---|
| 4 1960 CHEVROLET | 3-28-60 | 12-20-67 | 55 00 | 2,100.00 | 2,800.00 | (645.00) |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| 5 Total (If gain, enter on line 9; if loss, enter on line 11. Identify as gain or loss from Part II.) | | | | | | (645.00) |

PART III—CAPITAL ASSETS

Short-Term Capital Gains and Losses—Assets Held Not More Than 6 Months

| | | | | | | |
|---|---|---|---|---|---|---|
| 6 | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| 7 Unused capital loss carryover (attach statement) | | | | | | |
| 8 Net short-term capital gain (or loss) | | | | | | |

Long-Term Capital Gains and Losses—Assets Held More Than 6 Months

| | | | | | | |
|---|---|---|---|---|---|---|
| 9 200 MADISON FUND INC | 10-64 | 5-68 | 26,261.99 | | 19,672.33 | 6,589.66 |
| 124 OPPEN CORP INC | 6-63 | 9-65 | 7,246.59 | | 2,277.95 | 4,968.64 |
| 104 OPPEN CORP | 6-63 | 4-65 | 2493.27 | | 1,237.92 | 2,755.80 |
| CAPITAL GAIN DIVIDEND - TAI CONTINENTAL | | | | | | 1,050 00 |
| 10 Net long-term capital gain (or loss) | | | | | | 15,363.60 |

PART IV—PROPERTY OTHER THAN CAPITAL ASSETS

| | | | | | | |
|---|---|---|---|---|---|---|
| 11 LOSS FROM PART II | | | | | | (645.00) |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| 12 Net gain (or loss). Enter here and on line 19 | | | | | | 14,718.60 |

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

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**3468** — Treasury Department, Internal Revenue Service

# Computation of Investment Credit

TO BE ATTACHED TO YOUR TAX RETURN
For calendar year 1967 or other taxable year beginning JULY 1, 1967, ending JUNE 30, 1968

**1967**

Name and address: HAROLD FALCON ASSOCIATES INC
258 BROADWAY
NEW YORK, N.Y. 10007

Investment in new and used property including investment in suspension period property
NOTE: Include your share of investment in property by a partnership, estate, trust, small business corporation, or lessor.

| Type of property | Line | (1) Life years | (2) Cost or basis | (3) Applicable percentage | (4) Investment (Column 2 x column 3) |
|---|---|---|---|---|---|
| NEW PROPERTY | (a) | 4 or more but less than 6 | 97,788.00 | 33⅓ | 32,262.51 |
| | (b) | 6 or more but less than 8 | | 66⅔ | |
| | (c) | 8 or more | 212.00 | 100 | 212.00 |
| USED PROPERTY (see instructions for dollar limitation) | (d) | 4 or more but less than 6 | | 33⅓ | |
| | (e) | 6 or more but less than 8 | | 66⅔ | |
| | (f) | 8 or more | | 100 | |

| | | |
|---|---|---|
| Total investment—Add lines 1(a) through (f) | | 33,474.67 |
| (a) Amount of investment on line 2 which is attributable to suspension period property | | |
| (b) Amount of exemption from suspension period property (cost of suspension period property in column 2, line 1, which is selected to be treated as qualified property—not to exceed $20,000 less any amount selected in prior year) | | |

(c) Enter in column 2 below the amount of investment on line 3(b) according to life years:

| (1) Life years | (2) Cost or basis | (3) Applicable percentage | (4) (Column 2 x column 3) |
|---|---|---|---|
| 4 or more but less than 6 | | 33⅓ | |
| 6 or more but less than 8 | | 66⅔ | |
| 8 or more | | 100 | |

| | | |
|---|---|---|
| (d) Total of column 4 | | |
| 4 Line 3(a) less line 3(d) | | 33,474.67 |
| 5 Total qualified investment—Line 2 less line 4 | | 33,474.67 |
| 6 Tentative investment credit—7% of line 5 (3% for public utility property) | | 2,343.23 |
| 7 Carryback and carryover of unused credit(s) (attach computation) | | |
| 8 TOTAL—Add lines 6 and 7 | | 2,343.23 |

**LIMITATION**

| | | |
|---|---|---|
| 9 (a) Individuals—Enter amount from line 12, page 1, Form 1040 | | 130,992.08 |
| (b) Estates and trusts—Enter amount from line 23 or 26, page 1, Form 1041 | | |
| (c) Corporations—Enter amount from line 7, Tax Computation Schedule, Form 1120 | | |
| 10 Individuals, estates and trusts: (a) Foreign tax credit | | |
| (b) Retirement income credit | | |
| 11 Total—Add lines 10(a) and (b) | | |
| 12 Line 9 less line 11 | | 130,992.08 |
| (Married persons filing separately, affiliated groups, estates and trusts, see instruction 13) | | |
| 13 (a) Enter amount on line 12 or $25,000, whichever is lesser | | 25,000.00 |
| (b) If line 12 exceeds $25,000, multiply the excess by the applicable percentage determined in accordance with instruction 13 | | 72,996.04 |
| 14 Total—Add lines 13(a) and (b) | | 97,996.04 |
| 15 Less 7% of line 4 (3% for public utility property) | | — |
| 16 Line 14 less line 15 | | 97,996.04 |
| 17 Investment credit—Enter amount on line 8 or line 16, whichever is lesser | | 2,343.23 |

**SCHEDULE A**

If any part of your investment in 1 above was made by a partnership, estate, trust, small business corporation, or lessor complete the following:

| Name (Partnership, estate, trust, etc.) | Address | Property: New | Property: Used | Property: Life years |
|---|---|---|---|---|
| INT: GUNNING HIRCH CORP | 320 MADISON AVE. N.Y. N.Y. | $ 96,262.00 | $ | 4-6 |
| | | | | |
| | | | | |

EXHIBIT 5A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

Harold Joyce Associates, Inc., was organized in 1956 to take over the business started by Harold Joyce - changing the latter part of 1946.

Harold Joyce Associates, Inc., and several related organizations function primarily as consulting actuaries to multi-employer pension funds, welfare funds, supplemental unemployment funds, etc.

As shown in Exhibit B, attached there are 143 clients, most of which have been clients continuously for more than ten years.

The staff consists of 33 persons and is being expanded as rapidly as competent experienced persons can be found. The stability of the staff is demonstrated by the fact that only seven persons have been on the staff for five years or less. Seven employees have been on the staff for ten years or more.

[illegible] occupies [illegible] floors of a five story building at 853 Broadway. The floor contains approximately 6,000 net sq. ft. It is expected that an additional 3,000 square feet on the eighth floor will be occupied within the near future. The space on the eighth floor is vacant and a lease is being negotiated.

Harold Fagen Associates, Inc., owns a number of pieces of IBM unit record equipment and leases an IBM 360 model 20 computer. The present system uses cards but two disc drives are on order and delivery is expected within the next few weeks.

Since we are in constant touch with many trade unions, we have undertaken the task of [illegible] a carefully automated union office [illegible] [illegible] client base. [illegible] [illegible] [illegible]

Using the Peat Profit Planner and Computer
Capacity, we are in the process of programming computerized pension plan calculation for small and
medium size employers. We expect to provide these
services to stockbrokers, accountants and lawyers and
the availability of packaged pension plan services at
very reasonable prices will enable stockbrokers to
service these pension plans instead of losing them
for the insurance companies. It will also be
possible for the thousands of accounting firms throughout the Country to service their clients with
pension fund advice as the Continental Division
of Peat, Marwick, Mitchell services their clients.
The profit potential inherent in our operation
makes it possible for us to achieve any reasonable
goal we set while, at the same time, absorbing
the additional costs involved in developing new
programs. As shown in Exhibit A, attached, net
profit after tax for the first year of

EXHIBIT 5A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN



Original rate of discount 12 per cent
a year.

EXHIBIT 5A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

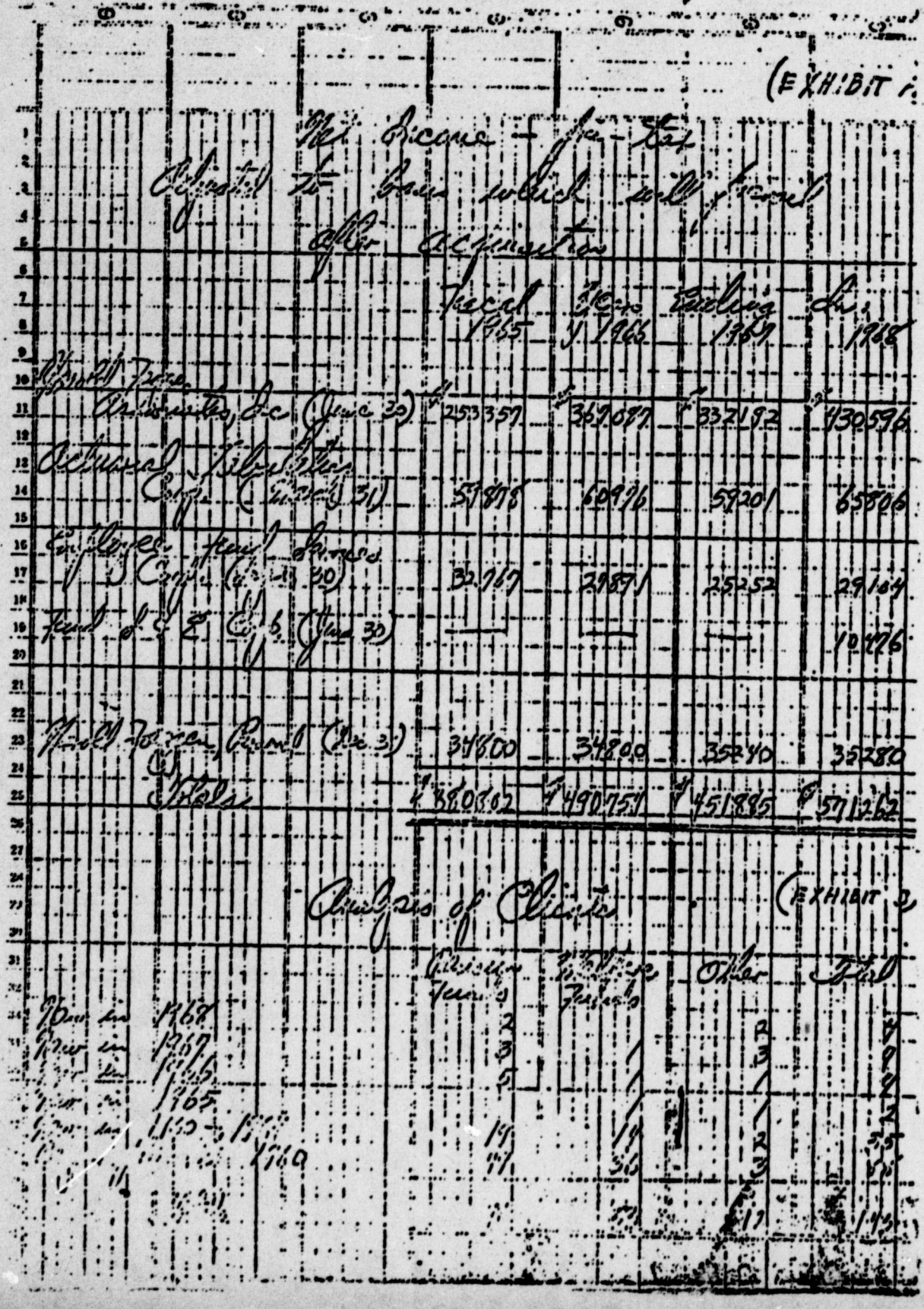

EXHIBIT 5B, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

(Confidential) 10 A. Kaufman
15 Feb 1957

Harold Faggen Associates, Inc. was organized in 1956 to take over the business started by Harold Faggen during the latter part of 1946.

Harold Faggen Associates, Inc. and several related organizations function primarily as consulting actuaries to multi-employer pension funds, welfare funds, supplemental unemployment funds, etc.

As shown in Exhibit B, attached there are 143 clients, most of which have been clients continuously for more than ten years.

The staff consists of 33 persons and is being expended as rapidly as competent experienced persons can be found. The stability of the staff is demonstrated by the fact that only seven employees have been on the staff for five years or less. Sixteen employees have been on the staff for ten years or longe:

The Corporations occupy the ninth floor of a fire proof building at 853 Broadway. The floor contains approximately 6,000 net feet. It is expect that an additional 3,000 square feet on the eighth floor will be occupied within the near future. The space on the eighth floor is vacant and a lease is being negotiated.

EXHIBIT 5B, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

Harold Faggen Associates, Inc. owns a number of pieces of IBM unit record equipment and leases and IBM 360 Model 20 Computer. The present system uses cards but two disc drives are on order and delivery is expected within the next few weeks.

Since we are in constant touch with many trade unions, we have undertaken the task of programming a completely automated union office. A very substantial client has already been obtained and we expect the fees from this client to be sufficient to pay all development costs.

Since we have both actuarial and computer capacity, we are in the process of programming completely automated pension plan calculations for small and medium size employers. We expect to provide these services to stock brokers, accountants and lawyers only. The availability of packaged pension plan services at very reasonable prices will enable stock brokers to service the pension plans instead of leaving them for the insurance companies. It will also be possible for the thousands of accounting firms throughout the country to service their clients with pension fund advice as the Ostheimer Division of Peat, Marwick, Mitchell services their clients.

The profit potential interest in our operation makes it possible for us to achieve any reasonable goal we set,

while, at the same time, absorbing the additional costs involved in developing new programs. As shown in Exhibit A attached, net profit before tax has been growing at a compound rate of approximately 15 percent a year.

EXHIBIT 5B, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

(EXHIBIT A)

Net Income - Pre-Tax
Adjusted to basis which will
prevail after acquisition
(includes investment income)

| | Fiscal Years Ending In: | | | |
|---|---|---|---|---|
| | 1965 | 1966 | 1967 | 1968 |
| arold Faggen Associates, Inc. (June 30) | $253,357 | $367,087 | $332,192 | $430,596 |
| ctuarial Tabulating Corp. (March 31) | 59,878 | 60,976 | 59,201 | 65,806 |
| mployee Fund Services Corp. (Sept. 30) | 32,767 | 27,891 | 25,252 | 29,104 |
| und S & E Corp. (June 30) | ——— | ——— | ——— | 10,470 |
| arold Faggen, Personal (Dec. 31) | 34,800 | 34,800 | 35,240 | 35,280 |
| Totals | $380,802 | $490,754 | $451,885 | $571,262 |

EXHIBIT 5B, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN
(Exhibit B)

Analysis of Clients

| | Pension Funds | Welfare Funds | Other | Total |
|---|---|---|---|---|
| New in 1968 | 2 | | 2 | 4 |
| New in 1967 | 3 | 1 | 3 | 7 |
| New in 1966 | 5 | 1 | 1 | 7 |
| New in 1965 | | 1 | 1 | 2 |
| New in 1960-1964 | 19 | 14 | 2 | 35 |
| Began Prior to 1960 | 49 | 36 | 3 | 88 |
| Totals | 78 | 53 | 12 | 143 |

EXHIBIT 5C, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

MEMORANDUM

October 7, 1968

TO: Edmund Kaufman

FROM: Anthony M. Frank

(1) Sam Bergman hurt his shoulder at the Airport today and may not be able to attend Titan's Board meeting on Wednesday.

(2) Ben spoke with Faggen. Faggen is agreeable if:

(a) We make available 25,000 shares for stock options to his eight to ten key employees.

(b) He would like $750,000 of his debentures convertible at 15, rather than 20. My calculations indicate this would increase the number of shares by 12,500 over the 275,000 we have been discussing.

I told Ben that I would go along with these two requests. We will try to obtain a letter from Harold to present to the Board meeting on Wednesday.

(3) I am enclosing a copy of a letter from Gene Colman just received. This letter raises a number of questions:

(a) What is the tax effect of Titan substituting for Colman as guarantor of bank loans?

(b) I had figured that the shares we were paying for his inventory would also serve as compensation for "a value for the operating company."

(c) The $14 down-side protection matter.

It is my personal opinion that these matters can be resolved, but certainly not in time to present to the Board this Wednesday (particularly when we have yet to arrive at an evaluation of the land holdings now held by Vermont Lumber Company).

I am off for Denver, and expect to speak to you tomorrow from New York.

AMF:jg
enc.

EXHIBIT 6A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

Minutes of the meeting of the Board of Directors of Titan Group, Inc. held on October 9, 1968 at the office of the corpotation, 529 Fifth Avenue, New York, New York, at 10:00 A.M.

PRESENT:

Leonard Casey
Alfred M. Frager
Anthony M. Frank
Kurt H. Grunebaum
Richard K. McIntyre
Benjamin M. Robinson
James A. Russell

ABSENT:

Samuel N. Bergman
Rosalie Futterman Gasco
Eugene A. Hegy, Jr.

Benjamin M. Robinson acted as Chairman of the meeting and Richard K. McIntyre as Secretary thereof. The Secretary presented to the meeting a copy of the notice thereof that had been sent by telegram or delivered by hand to each director together with an affidavit relating thereto. The Chairman directed that said notice and affidavit be filed with the minutes of the meeting.

Mr. Frank discussed the financial statements for the eight month period ended August 31, 1968 as well as the estimated results through September 30, 1968. He gave a detailed report on the various properties.

The Board approved the proposed sales of Highpoint and Barnaby Apartments for a price of $400,000 above the mortgages. $25,000 to be payable at contract, $25,000 six months from closing of sale and the balance of $350,000, with interest at

EXHIBIT 6A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

4%, to be paid at such time as the purchasers are able to refinance the project under a new FHA Rehabilitation Program and the proposed sale of the Highland Village Apartments in Los Angeles for a sum of $230,000 (total cash received in the form of down payment and prepaid interest) net above the mortgage. The company has a 25/85ths interest in the first mortgage on this property, representing an investment of approximately $240,000 at this time.

Mr. Frank also discussed the completion of the contracts which were executed September 5, 1968 for the sales of the six shopping centers and noted that the company would receive over $4,000,000 in cash for our equity. Approximately $1,875,000 would be received at the closing now scheduled for October 14th with the balance to be paid 90 days after closing. The purchaser is completing a major merger today and requested additional time in order to complete the necessary financial arrangements for the purchase of the centers. The Board unanimously approved and ratified the six contracts for the sale of the shopping centers and the proper officers were authorized to execute such deeds, stock certificates and other documents as may be necessary or advisable to consummate said contracts and the Secretary was authorized to certify to said authorizations in such form as may reasonably be requested by any title company or as may otherwise be required to convey good title in the respective jurisdictions where the properties are located.

EXHIBIT 6A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

As a result of the anticipated completion of the shopping center sale, the Company will be in an excellent position for future investments and Mr. Frank then detailed for the Board the anticipated areas of investment which would include the broad aspects of real estate. These can include, but would not be limited to, a mobile home condominium operation; mortgage brokerage and servicing firms; land development for commercial properties, home sites and recreational facilities as well as possible joint ventures in office buildings with reputable builders. He also felt that the new federal housing act programs could provide an excellent investment area as well as the possible manufacture of prefabricated homes. He also felt that the Company should expand its interest in services to business such as our present insurance brokerage operations and in related fields.

Mr. Frank then discussed for the benefit of the Board the proposed acquisition of the various companies owned by Harold Faggen. These firms specialize in actuarial consulting and computer services to various labor-management pension and welfare funds created through union contracts with multi-employers. The Faggen organization, through the use of a 360-20 IBM computer, has available data banks on several million employees and expects to expand into the computerization of actuarial processes which would be available for sale to insurance brokers and CPAs. In order to enter this field, it would probably require the services of another

EXHIBIT 6A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

360-20 or 25 computer. He indicated to the Board that an agreement in principle had been reached with Mr. Faggen whereby he would receive convertible debentures totaling $5,500,000 with an interest rate of 4%. The debentures would be convertible as follows: $750,000 convertible at $15.00 per share and the balance of $4,750,000 convertible at $20.00 per share or a total of 287,000 shares upon the ultimate conversion of all debentures. The terms of the debentures, premiums, etc. have to be worked out.

The Faggen organization employs an office force in excess of 30 people in its New York offices, of which 16 of the key employees have been with Mr. Faggen for over ten years.

The Board approved unanimously a motion to purchase these companies in accordance with the above terms subject to a final approval by the Executive Committee.

The Board accepted the resignation of Frederick A. Olita, Vice President, which had been tendered last month.

The President presented to the Board for consideration a proposal received from Wolf & Macklowe for the purchase of an office building site on a joint venture basis with W & M consisting of approximately 17,000 square feet located in the middle of the block between Fifth and Madison running from 52nd Street through to 53rd Street. It is proposed that a 41-story office building containing 350,000 square feet would be built for about $13,000,000 on the property. It is

EXHIBIT 6A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

expected that John Hancock Insurance Company would buy the land at cost from the proposed joint venturers and lease it back at 7½% and additionally give a 32 year loan of $13,000,000 for the building to be serviced at the rate of 8.4% constant. Additionally, John Hancock would require that it receive one-third of the cash flow generated by the building.

The proposal originally calls for an investment of $550,000 by Titan with an additional $400,000 to be put up within 90 days for the purchase of the land. The total land cost would be $8,500,000 or approximately $500.00 per square foot.

Despite the fact that the Company would receive a fairly advantageous position in the equity of the building, it was felt that since there were no firm loan commitments from John Hancock at this time, the Company should not make such a large commitment on a building project and since the proposed joint venturers had to make a commitment within the next twenty-four hours to purchase the land, the Board unanimously agreed to withdraw the item from consideration.

Mr. Frank then discussed the recent negotiations he has had with Eugene Colman, who was formerly with Hanover Equities a real estate firm in New York City and who has now become a land developer in the New England area, especially in the recreational district around Mt. Snow, Vermont. Mr. Colman, who is in his late 30's, has in the past few years become

EXHIBIT 6A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

involved in a number of separate activities including the buying of land in bulk with a low down payment and retailing lots to home owners, as well as buying farm land and subdividing it with retention of the farm house facilities for a community activity area for the adjacent home owners. He has acquired some 3,300 acres adjacent to Mt. Snow for an estimated price of $100.00 per acre and is now subdividing these acres after improving them with roads and selling them for $5,000 to $7,000 an acre. His present sales average between $125,000 to $150,000 a month with a pretax profit ranging between $30,000 and $40,000 per month. Mr. Colman owns the organization known as Vermont Lumber Company and has a sales manager as well as five (5) salesmen and other fulltime operating personnel. He expects to qualify the company in New York soon so that there can be direct mailings to New York State residents, which should increase the sales volume substantially. The lot sales are derived from drive-in purchasers (50%) and the balance as a result of direct mailings and newspaper coupons. The reason for the amount of drive-in purchasers is attributable to the fact that some 3,500 to 5,000 people visit the Mt. Snow area during a week-end, especially during the ski season.

Mr. Colman also has some 2,200 acres scattered around in the area, and he feels that his company should earn between $400,000 and $500,000 a year pretax. He is offering to sell his interest in the land at a price of approximately

EXHIBIT 6A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

$500.00 an acre or $1,500,000 (after Titan's assumption of about $800,000 in loans from New York banks) which he would take in the form of approximately 100,000 shares of Titan stock. Additionally, he would receive for a stipulated period of time, shares of Titan stock that would be available at the market price through the use of a credit of $1.00 for each $2.00 of after tax earnings. (Example: After tax earnings of $200 000 would give stock purchase credit of $100,000 and if Titan stock were selling for $20.00 per share, he would be entitled to an additional 5,000 shares for the applicable year.)

The Board directed Mr. Frank to continue negotiations with Mr. Colman on the basis outlined with the final terms subject to approval by the Executive Committee, with a price valuation based on the market price as of October 1, 1968.

Mr. Frank then reported to the Board on a study he has made over the past several months of the Bergman Exchange Agency operation in Chicago, which is a subsidiary of B & L and which does underwriting of long-haul trucking in a manner similar to the underwriting previously done by Compass on the west coast. Mr. Frank reviewed the table of organization at BXA and their standards of control, which he felt were better than average. He felt that the organization was well staffed and with Mr. Bergman's close supervision of the underwriting, the exposure was limited in this area.

EXHIBIT 6A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

The underwriting risks assumed are now up to $25,000 level, above which figure reinsurance is purchased. However, a major proportion of $3,000,000 in annual premium volume is represented by workmen's compensation policies on which there is no exposure and by Spector Freight which has a retroactive agreement whereby BXA is guaranteed a fixed profit on the underwriting of the Spector workmen's compensation, and which has a long history of satisfactory trucking operations. Mr. Frank pointed out that while the business written with certain insurance brokers was unprofitable and that the Spector income did subsidize the BXA office costs, he indicated that he agreed with Mr. Bergman that this type of operation was a vital adjunct to the B & L brokerage business and therefore it was necessary to continue the BXA operation when considered in the overall insurance operations. Mr. Frank showed an example of the income available to cover underwriting losses as follows:

| | | |
|---|---|---|
| Gross policy billed | | $100.00 |
| Old Republic fee | $ 7.50 | |
| Reinsurance costs (over $25,000) | 10.00 | |
| Overhead costs | 10.00 | |
| Brokerage commissions | 7.50 | |
| | | 35.00 |
| Net available to cover claims and/or losses | | $ 65.00 |

Mr. Frank indicated that he felt a payment of approximately $600,000 for the purchase of Mr. Bergman's 20% interest in the insurance division represented a full price, but if it could be paid out over a period of time, which period would be related to an employment contract with

EXHIBIT 6A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

Mr. Bergman, it would be in the best interests of the Company to acquire this minority interest. The Board unanimously approved the acquisition based upon the terms and conditions outlined by Mr. Frank and directed him to continue negotiations with Mr. Bergman.

Mr. Robinson then related to the Board that Messrs. Schneider and Hegy had each exercised his stock option for the purchase of 25,000 shares of stock at $7.50 per share and that they had requested the registration of the stock in accordance with the terms of their agreements with the Company. Mr. Robinson indicated that he had spoken with both men and told them that a registration statement at this time would not be practical because of major changes within the corporation which would make it difficult to prepare the required figures. From their standpoint, as they would have to pay the cost of such registration which could well exceed $50,000 because of continuing changes, he felt that some arrangement could be worked out with Messrs. Hegy and Schneider regarding the future registration of their shares, but he would inform the Board of the results of his discussions with the two men upon Mr. Hegy's return from his vacation.

There being no further business, the meeting adjourned at 3 P.M.

Richard L. McIntyre

Secretary

EXHIBIT 6B, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

TITAN GROUP, INC.
529 FIFTH AVENUE, NEW YORK, N.Y. 10017

This announcement was released to all news media at approximately 5:45 P.M. on Wednesday, October 9, 1968

## TITAN ANNOUNCES PLANS TO ACQUIRE GROUP OF ACTUARIAL-COMPUTER COMPANIES

Titan Group, Inc. (OTC) announced that its board of directors approved today, subject to final terms, the purchase of a group of New York based, privately-owned affiliated companies engaged for many years in providing actuarial consulting and computer services. Included in the companies purchased are Employee Fund Services Corp., Actuarial Tabulating Corp. and Harold Faggen Associates, Inc.

These acquisitions are the first by Titan since the election of Anthony M. Frank as president in April 1968. The transactions call for the issuance of convertible debentures in excess of $5,000,000.

Mr. Frank said that "Titan has been particularly attracted by the growth opportunities for computer pplications in the fields of pension and welfare funds. We contemplate further expansion in real estate construction, development and financing as well as in providing varied financial services to business."

Titan Group, Inc. has diversified real estate interests throughout the United States and a national network of insurance agencies. Its Titan Motor Inns division operates a chain of sixteen hotels and motels and its other holdings include office buildings, apartment houses and parking garages.

EXHIBIT 7, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

AGREEMENT OF SALE

by and among the

FAGGEN SHAREHOLDERS

and

TITAN GROUP, INC.

AGREEMENT OF SALE

THIS AGREEMENT OF SALE is made this day of , 1968, by and among the shareholders listed on Exhibit "A" attached hereto (hereinafter collectively referred to as the "FAGGEN SHAREHOLDERS") and TITAN GROUP, INC., a Delaware corporation, having its principal office at 529 Fifth Avenue, New York, New York (hereinafter referred to as "TITAN").

RECITALS

This Agreement is made in light of the following circumstances:

(i) The FAGGEN SHAREHOLDERS own all of the issued and outstanding stock (as shown on Exhibit "A" attached hereto) of EMPLOYEE FUND SERVICES CORP., a corporation, ACTUARIAL TABULATING CORP., a corporation, HAROLD FAGGEN ASSOCIATES, INC., a corporation, and CORP., a corporation, each with its principal place of business

EXHIBIT 7, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

at 853 Broadway, New York, New York (hereinafter referred to collectively as the "FAGGEN COMPANIES"); and

(ii) The FAGGEN COMPANIES are in the business of providing actuarial and computer services and related activities; and

(iii) TITAN (together with its subsidiary corporations) is engaged in diverse real estate, insurance, service and related activities; and

(iv) TITAN and the FAGGEN SHAREHOLDERS believe that it would be in their mutual best interests, and in the interest of TITAN's shareholders, for TITAN to purchase and acquire all of the issued and outstanding stock of the FAGGEN COMPANIES.

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter contained, the parties hereto agree as follows:

1. *Transfer of Stock.* For the consideration hereinafter provided, the FAGGEN SHAREHOLDERS shall sell, transfer, assign and convey to TITAN on the Closing Date (hereinafter defined) all of the issued and outstanding stock of each of the FAGGEN COMPANIES.

EXHIBIT 7, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

2. *Consideration for the Stock of the FAGGEN COMPANIES.* In consideration for said transfer and assignment by the FAGGEN SHAREHOLDERS, TITAN agrees to pay an aggregate purchase price of Five Million Five Hundred Thousand Dollars ($5,500,000.00), which will be represented by TITAN's 4% Convertible Installment Notes (the "Notes") in an aggregate principal amount equal to such purchase price and allocated among the FAGGEN SHAREHOLDERS in accordance with their interests as shown on Exhibit "A". The Notes shall be delivered to the FAGGEN SHAREHOLDERS on and shall be dated as of the Closing Date. The Notes shall bear interest at the rate of four percent (4%) per annum and shall be payable in two (2) installments, as set forth in and otherwise in the form attached hereto as Exhibit "B".

3. *Representations and Warranties of the FAGGEN SHAREHOLDERS.* The FAGGEN SHAREHOLDERS hereby jointly and severally represent and warrant the following (the truth and accuracy of each of which shall constitute a condition precedent to TITAN's obligations hereunder):

3.1 *Financial Statements.* Attached hereto and made a part hereof are the following exhibits:

EXHIBIT 7, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

Exhibit "C" - Balance Sheet and supporting schedules of each of the FAGGEN COMPANIES as at the end of the last fiscal year of each.

Exhibit "D" - Income Statement, together with supporting schedules, of each of the FAGGEN COMPANIES for their last fiscal years.

Exhibit "E" - Balance Sheet and supporting schedules of each of the FAGGEN COMPANIES as at September 30, 1968.

Exhibit "F" - Income Statement, together with supporting schedules, of each of the FAGGEN COMPANIES for the periods ended September 30, 1968.

Exhibits "C", "D", "E" and "F" (i) are in accordance with the respective books and records of the FAGGEN COMPANIES (except as stated therein to the contrary), (ii) set forth fairly each of their financial condition and results of operations as at the relevant dates thereof and for the periods covered thereby, all prepared in accordance with generally accepted accounting principles, (iii) contain and reflect all necessary adjustments for a fair presentation of the results of operations and financial condition for the periods covered by said financial statements, and (iv) with respect to each of

the FAGGEN COMPANIES' contracts and commitments, contain and reflect reserves for all material liabilities and for all reasonably anticipated material losses and costs in excess of expected receipts.

3.2 *Investment in Other Entities.* There are no entities in which any of the FAGGEN COMPANIES has any debt (other than trade accounts receivable) or equity interest, or any right or option to acquire any such interest, other than as set forth on a schedule attached hereto as Exhibit "G".

3.3 *Organization and Good Standing of FAGGEN COMPANIES.* Each of the FAGGEN COMPANIES is a corporation duly organized and existing and in good standing under the laws of the respective state of its incorporation, and has full corporate power to carry on its business as now conducted, and is entitled to own or lease or operate its properties and assets now owned, leased or operated by it. Each is qualified to do business and is in good standing in each jurisdiction (including foreign countries) in which the nature of its business and/or the character of its properties make such qualification necessary.

EXHIBIT 7, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

3.4 (i) *Outstanding Securities of FAGGEN COMPANIES.* The authorized capital stock and number of shares issued and outstanding on the date hereof of each of the FAGGEN COMPANIES is listed on Exhibit "A" attached hereto. Other than as disclosed in exhibits to this Agreement, no shares of any of the FAGGEN COMPANIES are held by any of them in their treasury or otherwise. All of the outstanding stock of each of the FAGGEN COMPANIES is validly issued, fully paid and nonassessable.

(ii) *Outstanding Options and Warrants.* There are not, and on the Closing Date there will not be, any options, warrants or other rights outstanding for the purchase of, nor any securities convertible into, capital stock of any of the FAGGEN COMPANIES, whether issued, unissued or held in the treasury.

3.5 *Absence of Certain Changes.* Other than as disclosed in exhibits to this Agreement, since September 30, 1968, there has not been:

(i) any material adverse change in the

* * *

EXHIBIT 8, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

(Xerox copy from letterhead)

October 23, 1968

Simon Sheib, Esq.
60 East 42 Street
New York, New York

Titan/Hagen

Dear Si:

I enclose copies of an Agreement of Sale and a 4% Convertible Installment Note which were prepared by Edmund M. Kaufman, Esq. of Ingalls & Manella, and which arrived by air freight just a short while ago.

These documents, which we are in the process of reviewing, should serve as the starting point for our discussions tomorrow at this office at 2:30 p.m.

Sincerely,

Michael N. Rosen

Enclosures

MNR/f
By Hand

EXHIBIT 9A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

INTERIM REPORT

NINE MONTHS ENDED SEPTEMBER 30, 1968

To Our Shareholders:

We are pleased to present for your information the consolidat summary of operations (unaudited) for the three- and nine-month periods ended September 30, 1968, with comparative figures for the previous year.

After careful analysis your Board of Directors determined that the profitable sale of our shopping center division at this time would accomplish two important goals: first, it would provide the corporation with substantial cash reserves for future investments; and secondly, it would eliminate the need for considerable cash investments in order to upgrade these older properties to current shopping center standards. Title to these centers was conveyed to the buyer on October 15, 1968 for a total consideration of approximately $4,500,000 above existing mortgages.

Our shareholders were advised recently that preliminary agreement has been reached for the acquisition of an affiliated group of actuarial and computer companies. While not yet final, this agreement calls for the issuance of $5,500,000 of 4% convertible debentures, $4,750,000 of which may be converted at $20 per share and $750,000 at $15 per share at the option of the holder ~~beginning~~

EXHIBIT 9A, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

For actuarial and valuation companies have net worth and liquid assets of more than $1.5 mil and shares increased net worth first year 2x times of $550,000 before tax.

~~in 19~~ . ~~Current earnings will add about 13 cents per share to our outstanding shares,~~ and future prospects for these privately-held companies are most encouraging. This acquisition, upon completion, will considerably strengthen our ability to provide financial services to business which, along with diversified real estate activities, constitutes our concept of the direction which the company will take in the years ahead.

Benjamin M. Robinson
Chairman of the Board

Anthony M. Fran
President

_____ (Date)

EXHIBIT 9B, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

Dft - Titan - Skirball Comic. — ne...
w/ copies in Kan...ind. (Hamill.) and
Faggen

Ex. PB

TITAN GROUP, INC.
529 FIFTH AVENUE, NEW YORK, N.Y. 10017 ☐ TELEPHONE (212) MO 1-3232

BENJAMIN M. ROBINSON
CHAIRMAN OF THE BOARD

ANTHONY M. FRANK
PRESIDENT

December 3, 1968

Dear Titan Shareholder:

We are pleased to report the consummation of the previously announced agreement to purchase a group of New York-based, privately owned companies engaged in providing actuarial consulting and computer services to multi-employer pension and profit sharing funds. Included in the companies purchased are Employee Fund Services Corp., Actuarial Tabulating Corp. and Harold Faggen Associates, Inc. Purchase price of the acquisitions was $5,500,000 in convertible debentures. Mr. Harold Faggen, Chairman, will remain to direct the activities of the acquired companies.

On November 26, 1968, the Company also agreed in principle to acquire Kansas Quality Construction, Inc. of Kansas City, Kansas for $7,750,000 in convertible subordinated debentures. Kansas Quality is one of the nation's largest independent builders of garden apartments, with more than 2,500 apartment units presently under construction in 20 states. In its fiscal year ending November 30, 1968, Kansas Quality will report approximately $19,000,000 in construction volume, and a pre-tax profit of approximately $900,000. The company has branches in Jacksonville, Denver and Dallas and a range of services that include not only construction, but financing, design, and property management. It will continue to be operated by the existing management team led by Jack Bertoglio, Chairman.

The acquisition is subject to the satisfactory completion of a final agreement and approval of Kansas Quality shareholders and Titan's board of directors.

Sincerely,

Benjamin M. Robinson

Benjamin M. Robinson
Chairman

Anthony M. Frank

Anthony M. Frank
President

EXHIBIT 10, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

10

ROBINSON, SILVERMAN, PEARCE, BORDEN & BALL
230 PARK AVENUE
NEW YORK, N. Y. 10017

BENJAMIN M. ROBINSON
ALAN J. S. ARONSOHN
MATTHEW SILVERMAN
SAUL PEARCE
LEONARD B. SAND
ARTHUR M. BORDEN
JOHN H. BALL
LAURENCE A. SPELMAN
STANLEY BERMAN
WALLACE J. BORKER
LEWIS R. KASTER
LEO SILVERSTEIN
EDWARD B. SCHOEN
JOSEPH J. MOSCOU
WILLIAM RUBIN
JAMES F. GILL
JORDON J. FINGAR
MICHAEL N. ROSEN
ARTHUR W. BRILL
ALAN S. PEARCE

AREA CODE 212
MURRAY HILL 9-7766
CABLE: "ROSILPE"

November 8, 1968

Edmund M. Kaufman, Esq.
Irell & Manella
Gateway East Building
Century City
Los Angeles, California 90067

Re: Titan/Faggen

Dear Ed:

I enclose, in duplicate, revised copies of the draft of the Agreement of Sale and 4% Convertible Installment Note. You will note that Paragraph 6 of the Agreement concerning the Federal Securities Act has been omitted. It is in the course of preparation and I will send it to you as soon as it is ready.

The principal change in the structure of the Agreement, as distinguished from its substance, is the omission of a separate contract and closing, and the provision instead for simultaneous execution of the Agreement and closing of the transaction. I also call your attention to the fact that we now contemplate four separate transactions, as distinguished from one transaction relating to all four Faggen corporations. Therefore, there will be four separate Agreements, one relating to each of the corporations. You should, in addition, note that in the case of one of the Faggen corporations, there is, I understand, certain sculpture which is owned by a subsidiary of that corporation which will be spun off simultaneously with the con-

summation of the Agreement. Accordingly, the Agreement relating to that corporation will have to be changed to reflect this peripheral transaction.

For your convenience, I have redlined the major changes in language embodied in the current drafts of the Agreement and Note but not included in their predecessors.

Aside from the omission of language relating to the operations of the company between contract and closing, I have also omitted, subject to your approval, certain language such as that contained in Paragraph 3.6(iv), 3.7(b), and 3.10(i) and (ii) relating to patents and trademarks and foreign assets, all of which are inapplicable.

Please also note that I have not completed Paragraph 7.3, relating to the obligation of the company to continue its pension plan in full force and effect, as that subject is still under discussion.

If I can be of any help to you in connection with your review of the Agreement or the Note, please do not hesitate to call.

Sincerely,

Michael N. Rosen

Enclosures

MNR/f
Airmail

EXHIBIT 11, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

JOSEPH WARREN & CO.
CERTIFIED PUBLIC ACCOUNTANTS
360 LEXINGTON AVENUE
NEW YORK, N. Y. 10017

November 25, 1968

Harold Faggen Associates, Inc.
853 Broadway
New York, N. Y. 10003

Gentlemen:

There are enclosed herewith the balance sheet of Harold Faggen Associates, Inc. as of September 30, 1968 and the statement of income and expenses for the three months ended September 30, 1968.

The books and records are maintained on a cash basis. Solely for the purposes of this report, adjustments have been made to reflect the balance sheet on an accrual basis. The adjustments include accrual of uncollected receivables, accrued liabilities, expenses and taxes. Except for $7,472.00 of fees received in advance, no provision has been made for future services which may be required to complete assignments for which fees have been received prior to or accrued as of September 30, 1968.

The statement of income and expenses does not properly reflect the earnings for the period. The income is overstated because and to the extent that the opening balances on an accrual basis have not been taken into account.

Inasmuch as the statements are prepared from your books and records, without independent verification thereof and because of the change in accounting method described above, we are unable to express any opinion with respect thereto.

Joseph Warren & Co.

EXHIBIT 11, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

JOSEPH, WARREN & CO.

HAROLD FAGGEN ASSOCIATES, INC.

BALANCE SHEET

SEPTEMBER 30, 1968

A S S E T S

| | | |
|---|---|---|
| Cash in bank and on hand | | $ 131,779.43 |
| Certificate of deposit | | 100,000.00 |
| Accounts receivable | | 258,437.49 |
| Due from Harold Faggen * | | 40,370.00 |
| Office furniture and machines - Less accumulated depreciation of $62,839.35 | | 19,748.05 |
| Investments - at cost - Market value $834,684.87 | | 628,255.50 |
| Sundry receivables | | 1,404.60 |
| | | $1,179,995.07 |

LIABILITIES AND CAPITAL

| | | |
|---|---|---|
| Liabilities | | |
| Accounts payable | | $ 29,859.74 |
| Accrued vacation pay | | 59,000.00 |
| Fees collected in advance | | 7,472.00 |
| Taxes payable | | 41,838.88 |
| Federal income taxes payable | | 203,480.85 |
| | | 341,651.47 |
| Capital stock | $ 300.00 | |
| Retained earnings | 838,043.60 | |
| | | 838,343.60 |
| | | $1,179,995.07 |

* Repaid to Company in October, 1968

PREPARED FROM BOOKS WITHOUT AUDIT

THE COMMENTS IN THE ACCOMPANYING LETTER OF TRANSMITTAL ARE AN INTEGRAL PART HEREOF

EXHIBIT 11, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN

JOSEPH WARREN & CO.

HAROLD FAGGEN ASSOCIATES, INC.

STATEMENT OF INCOME AND EXPENSES

FOR THE THREE MONTHS ENDED SEPTEMBER 30, 1968

| | | |
|---|---|---|
| Fees and retainers | | $454,772.08 |
| Investment income | | 7,463.81 |
| Gain on sale of securities | | 8,096.12 |
| | | 470,332.01 |
| **Expenses** | | |
| Salaries | $126,838.87 | |
| Rent and electricity | 7,375.23 | |
| Rent and maintenance of office machines | 9,230.65 | |
| Stationery, postage and office expenses | 6,042.01 | |
| Telephone | 1,907.68 | |
| Travel and entertainment | 10,513.89 | |
| Promotion | 627.10 | |
| Taxes | 65,685.23 | |
| H.F.A. Employee benefits | 5,532.14 | |
| Office meals | 1,140.99 | |
| Depreciation | 1,004.27 | |
| Insurance | 873.33 | |
| Sundry expenses | 1,813.35 | |
| | | 238,584.74 |
| Net Income before provision for federal income tax | | 231,747.27 |
| Provision for federal income tax | | 140,000.00 |
| Net Income | | 91,747.27 |
| Retained earnings, July 1, 1968 | | 746,296.33 |
| Retained Earnings, September 30, 1968 | | $838,043.60 |

PREPARED FROM BOOKS WITHOUT AUDIT

THE COMMENTS IN THE ACCOMPANYING LETTER OF TRANSMITTAL ARE AN INTEGRAL PART HEREOF

EXHIBIT 12, ANNEXED TO AFFIDAVIT OF EDMUND M. KAUFMAN.

TITAN GROUP, INC.
529 FIFTH AVENUE, NEW YORK, N.Y. 10017 ☐ TELEPHONE (212) MO 1-3938

BENJAMIN M. ROBINSON
CHAIRMAN OF THE BOARD

55-5

DATE – NONE
rec'd Mon 11/9/64

To the Board of Directors:

We will be sending you information on a series of matters to be taken up at the Board meeting on December 12th.

One matter involves changes in the officers and in the membership of the Board;

(1) the resignation of Richard K. McIntyre as a Director.

(2) the election of John Spence as a member of the Board and as Vice President, Financial. Proposed salary is $45,000 plus 15,000 share option.

(3) the election to the Board of Edmund Kaufman, a member of the law firm of Irell and Manella, who are counsel to the Block group.

(4) the election of Benj. Weinstein, recommended by the Block group. A sketch of Mr. Weinstein is attached hereto.

(5) the resignation of Sydney Schneider.

(6) the election as Vice President, Land Development, of Robert C. Brink. Sketch ~~will follow~~. Proposed salary is $30,000 and 12,500 share option.

(7) election of Harold Faggen to Board.

Enclosed also is the review of proposed action on reserves for certain of our properties.

President Frank is sending directly to you information on certain proposed land deals.

Benjamin M. Robinson
Chairman

AFFIDAVIT OF DANIEL G. HATCHER, JR. IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND INJUNCTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of Kentucky,

County of Jefferson, ss:

DANIEL G. HATCHER, Jr., being duly sworn, deposes and says:

1. I am Financial Vice President-Treasurer of Titan Group, Inc. ("Titan") and have been responsible for corporate financial matters since November, 1970. In connection with an investigation of representations as to earnings of the companies owned by Harold Faggen and acquired by Titan (the "Faggen Companies"), I have undertaken personally, and with my staff and through accounting personnel in the Faggen Companies, as well as through conferences with and inquiry by Touche, Ross & Co. (Titan's auditors) an intensive investigation of the earnings of the Faggen Companies from 1965 through 1968. We have attempted to reconcile the "Net Income - Pre-Tax" figures set forth in Exhibit 1 to the complaint in this action, with apparent adjustments made by Harold Faggen in order to reach such figures, as set forth in his handwriting

on Exhibit 9 to the Kaufman affidavit. Such adjustments have been measured by generally accepted accounting principles as applied to the actual books and accounts of the Faggen Companies during the subject period. This affidavit sets forth our accounting findings to date on the subject matter of this action.

2. At the outset it should be noted that as far as is known the figures contained herein (and their predecessors in the complaint) represent the first audit of the Faggen Companies for the years 1965 through 1968, since their acquisition by Titan on December 2, 1968. Further, so far as is known, during the years 1969 and 1970 following the acquisition, auditors for Titan made no attempt to audit the books and records of the Faggen Companies for periods *prior* to their acquisition, relying solely on the accounting statements of Joseph Warren & Co. provided at the closing (dated as of September 30, 1968), in order to establish opening entries for the last quarter of 1968 and beginning entries for the year 1969, and proceeding forward from such base. Annexed hereto as Exhibit A is an accounting memorandum from a predecessor financial officer in Titan, Mr. J. B. Russo, to executives and accounting personnel in the Faggen Companies.

AFFIDAVIT OF DANIEL G. HATCHER

This memorandum as of January 21, 1969 indicates the intention to use accrual basis accounting immediately after the closing, subject to obtaining a ruling from the Internal Revenue Service which would permit filing certain tax returns on a cash basis. The substance of these accounting instructions is to take the books of account of the Faggen Companies as we found them, and handle them on a accrual basis for the future. To the best of my knowledge, no one in the financial division of Titan made any attempt to reconcile the earning power represented by Harold Faggen with the actual books of account of the Faggen Companies as received until long after the acquisition, for the reasons shown below.

*Continuing Concealment of Facts*

3. Joseph Levine, to whom the foregoing memorandum was addressed, was a former employee of Joseph Warren & Co. who had become a full-time accounting officer of the Faggen Companies. In the years following this acquisition he and Harold Faggen, along with the Joseph Warren & Co. firm, kept complete control of the books and records of the Faggen Companies for the years prior to the acquisition, and maintained effective control

(subject only to submitting reports to corporate headquarters) of these books and records after the acquisition. Warren did the audit for the year 1969 and submitted his results to Titan's auditors, Peat Marwick & Mitchell. When the management of Titan began to investigate the underpinnings of the Faggen acquisition intensively early in 1972, we were instructed by our counsel to do for the first time a complete audit of the books of the Faggen Companies for the four years preceding the date of acquisition. Until that time no such audit had ever been undertaken, and while current management of Titan suspected by 1972 the possibility of irregularities in the Faggen transaction because, among other things, of the drastic downturn in earnings in 1969 and 1970 in the Faggen Companies, there was no hard evidence indicating fraudulent misrepresentations as to earning power in the Faggen Companies. When counsel took charge of the accounting investigation in the beginning of 1972, he stressed to me the significance of Exhibit 1 annexed to the complaint as a written representation of the earning power of the Faggen Companies for four years which new management had found in the Board of Directors' files relating to this 1968 acquisition. Upon attempting to

institute an audit of the Faggen books, I ran into a "stone wall" with both Mr. Faggen and his accountant, Joseph Warren & Co., who retained all of the papers and schedules for the four years preceding the acquisition. First Faggen told me that he did not have any of the accounting records for such four year period, and that Titan had the records and presumably had taken them to its offices in Los Angeles. Learning that we did not have the records, I contacted Joseph Warren to see what records he might have. He indicated he had certain records and work sheets but would not part with them without Faggen's consent.

I promptly turned the matter over to counsel who called Mr. Warren on February 8, 1972, and requested the accounting work papers and other documents for the years preceding the acquisition. Mr. Warren acknowledged that he had these papers, and had no objection to turning them over, but said he would supply them only if authorized by Mr. Faggen and only upon a written demand letter from our counsel. A copy of this letter dated February 9, 1972, annexed hereto as Exhibit B, reflects the conversation with Warren and shows our initial attempt to get summary accounting data upon which to base an audit of

the years in question. I then requested Faggen to consent to release of the papers, and Faggen told me he would not agree to release of any information by Warren and would not cooperate in any investigation whose results might be used against him.

Annexed hereto as Exhibit C is Warren's letter some weeks later saying Mr. Faggen was ill and he would do nothing until authorized by some advice from Mr. Faggen. Counsel again requested the material and indicated a court proceeding would be instituted to obtain it if not voluntarily supplied. Warren, and Mr. Faggen, who was recovering from a serious illness in March, still refused to supply the materials. By April of 1972 the executives of Titan had determined that it was appropriate to institute court action to obtain these materials in order to complete an audit of Faggen's books and records. The second cause of action in the complaint seeks such relief.

4. However, also in April, 1972, members of the corporate accounting staff were required to enter the offices of the Faggen Companies to do accounting work in connection with the 1971 audit for the home office of the corporation. At this time, Mr. Faggen was still ill.

AFFIDAVIT OF DANIEL G. HATCHER

A member of the corporate accounting staff went directly to the internal accounting staff of the Faggen Companies and asked for all their ledgers, books and accounting records, including those for periods preceding the acquisition, received them, and thereupon undertook the preliminary audit. To this date we have never received the work papers and other schedules in the possession of Joseph Warren, and are, of course, prejudiced by not having the work sheets and other summaries of the raw data prepared at the time. Even after an attempt to get them through Simon Sheib, Mr. Faggen's attorney, we were again refused, as per his letter to our counsel of April 17, 1972, annexed as Exhibit D, to which we have also annexed our answer of counsel dated April 21, 1972, and which describes the difficulties we still had in obtaining all the requested auditing material we required to do our audit. In light of these facts, it is particularly difficult to accept the statement in Faggen's moving affidavit:

> "In this connection, it should be noted that following the consummation of the purchase of the Faggen Companies the plaintiff conducted an audit of the Faggen Companies, which audit

was completed in March 1969. The books and records of the Faggen Companies were again audited by plaintiff's independent certified public accountants early in 1970. No demand or claim was made, nor was any action or proceeding commenced by March 31, 1970. Indeed, prior to the commencement of this action, there was no indication whatever that there was any inaccuracy in any of the figures supplied to the plaintiff as part of any of the agreements" (paragraph 6, page 5, Faggen moving affidavit).

Considering the record of refusal to supply corporate records for the years preceding the acquisition, the quoted statement appears to be very far from the true picture. As indicated in the Kaufman affidavit herein, which I have reviewed, there were many changes of operating management in Titan over the years, and defendant Faggen and Mr. Robinson, who recommended acquisition of his companies, were esteemed members of Titan's Board and members of the Executive Committed during this period. As indicated in an exhibit to Mr. Kaufman's affidavit, Mr. Faggen would turn a reasonable attempt to have Home

AFFIDAVIT OF DANIEL G. HATCHER

Office executives review his methods as an affront to his dignity, and refused to speak to them on occasion. It was not until the end of 1971 that an intensive investigation was begun on the facts leading up to this acquisition and it was not until the spring of 1972 that counsel put the issues under the securities laws into focus for us and pointed our accounting staff in the direction of an audit in the year in which earning power had been represented by Faggen. Some of the exhibits to the Kaufman affidavit were obtained only recently when counsel rechecked those files in order to meet the xontentions in Mr. Faggen's moving affidavit. The affidavit of Mr. Frankel showing his difficulties throughout 1971 in trying to find a solution to the lack of earning power in the Faggen Companies and the apparent overpayment for them on strictly a business level indicates the sincerity of current management in trying to deal with the problem. But it was only in early 1972, when counsel isolated the key disclosure documents first obtained from the files of our former counsel, Edmund M. Kaufman, in California, and put them together with other material in the files, that this claim was clarified with the necessity of an audit to verify the validity of the earnings of the Faggen

Companies. The audit is still not completed and there are many unanswered questions to which only Joseph Warren & Co. and Mr. Faggen have the answers.

*Earnings of the Faggen Companies*

5. Annexed hereto as Exhibit E are preliminary financial statements for the years 1965, 1966, 1967 and 1968, based on the review of the Faggen ledgers which we recently completed. They are not final audited figures and may be subject to further adjustments, but they are as complete and reliable as the facts available to us now will permit. Translating the detailed net income figures into ultimate results, they show the following comparison between the represented earning power of the Faggen Companies and their actual pre-tax earning power, giving effect to all valid adjustment items which Faggen represented would increase income during the years in question:

AFFIDAVIT OF DANIEL G. HATCHER

| Year | Represented Net Income | Actual Income (approximate) | Overstatement (approximate) | Percentage Overstatement |
|---|---|---|---|---|
| 1965 | $380,802 | $261,000 | $121,000 | 46% |
| 1966 | 490,754 | 303,000 | 187,000 | 62% |
| 1967 | 451,885 | 336,000 | 116,000 | 35% |
| 1968 | 571,262 | 404,000 | 167,000 | 41% |

Earnings, similarly adjusted, in the last three years have been $260,000 (1969), $192,000 (1970), $136,000 (1971).

These corrected actual income statements are different, i.e., showing much greater percentage misrepresentations, than the actual income contained in paragraph 7 of the Complaint. This occurred because we did not have the specific adjustment items supplied by Faggen until he made this motion, and on furthe research into Kaufman's legal files turned up the background of the handwritten set of adjustments proffered by Faggen in October 1968 (Exhibit 4, Kaufman Aff.). Also in our preliminary audit prior to filing the complaint we *included* investment income which Faggen plainly intended to *exclude* from his $571,000 representation of operating earnings for 1968, and for previous years (see Exhibits 3, 4 and 5A, Kaufman Aff.).

6. Exhibit E shows misrepresentations of earning power to an astonishing degree, with an exaggeration of over 41% in 1968 and 62% in 1966, taking Faggen's adjustments in the best possible light. My staff took the cash receipts and disbursements from the ledgers, made the minor adjustments necessary to convert them to accrued basis income, and gave credit to Faggen for all valid adjustments upward - city and state taxes, reduction of his salary and credit for his personal accounting fee revenues. The other adjustments proffered by Faggen, as will be shown below, just do not stand up on our review of his books over the four-year period.

7. When the Faggen Companies' operating earnings are examined from the viewpoint of the scale of his earning power and rate of growth, the small scale of recent growth (i.e. prior to acquisition) was concealed by Faggen's enlarged presentation, through the use of adjustments.

AFFIDAVIT OF DANIEL G. HATCHER

| Year | Represented Pro Forma Net Income | Represented Growth | Actual Income (approximate) | Actual Growth |
|---|---|---|---|---|
| 1965 | $380,802 | | $261,000 | |
| | | $+110,000 | | $+42,000 |
| 1966 | 490,754 | | 303,000 | |
| | | - 39,000 | | +33,000 |
| 1967 | 451,885 | | 336,000 | |
| | | +120,000 | | +68,000 |
| 1968 | 571,262 | | 404,000 | |

Rather than growing at a substantial rate of some 30% between 1965 and 1966, then some 28% between 1967 and 1968, the growth in actual net income of the Faggen Companies was small in scale. 1968 was the first year that earnings indicated a business large enough in scale of earnings to indicate genuine staying power. It must be remembered that $404,000 pre-tax is approximately $200,000 in earnings after taxes (federal, state and city). If accurately and fully disclosed, the scale and relationship of each year's earnings would have indicated special risks requiring further investigation by Titan. The Faggen memorandum stating "Net profit before tax has been growing at a compound rate of approximately 15 percent a year" conveyed a misleading impression when superimposed on a represented earnings level of $571,000 in 1968 and $490,000 in 1966. The reality here was a small scale service business which did not show growth

power of $110,000 in one year (1966) and $120,000 in a following year (1968), as Faggen's presentation indicated. The exaggerated scale of the business at $571,000 in 1968 was used to induce a 10 times multiple. With such a small scale business, if truly disclosed, there would have been a serious issue as to whether Titan should buy the Faggen Companies at all, at amy multiple. When we are able to complete an internal audit the exaggeration for the four years may be even more, but we believe our figures based on the ledgers are firm as to the minimum amount of overstatement. It should be noted at this point however, that every dollar of overstatement was worth $10 in Titan's notes to Mr. Faggen. The fact was obscured that Faggen's business was small scale with the underlying risk that operating earnings could substantially evaporate after they were paid for at a ten times multiple. Such event occurred - the $136,000 pre-tax in 1971 is barely $65,000 in after-tax earnings.

8. In Mr. Faggen's motion papers, he contends that the represented "Net Income - Pre-Tax * * * adjusted to basis which would prevail after acquisition" was not intended to be a "restatement on an accrual basis and was not represented to be such" (paragraph 4, page 4, Faggen

affidavit). This is not a relevant comment. First, the adjustments necessary each year to convert revenues from cash basis to accrual basis are insubstantial - $5,523 was deducted from cash income in 1968, $17,65[illegible] added (in Faggen's favor) in 1967, $41,871 deducted in 1966 and $33,053 deducted in 1965 (See Exhibit E). These are minimal amounts on businesses grossing around $1 million annually over the four years.

Moreover, over a four-year period, cash basis results should approximate accrual basis results in total, for the reasons stated by affiant Kaufman, and the foregoing minimal adjustments show that the two accounting methods do not give widely divergent results in this case. Also the pro-forma statement, addressed by Faggen to executives in Titan who were not accountants, is silent on whether it was on a cash basis or accrual basis. The next month following his acquisition a change over to accrual basis accounting was instituted in the Faggen Companies.

Finally, in reviewing Exhibit 4 to the Kaufman affidavit, which is Mr. Faggen's handwritten explanation of the adjustments which went into the $571,000 pre-tax earnings for 1968, represented to Titan management, I

note that Mr. Faggen himself seems to adopt accrual principles of accounting at several points where the result is in his favor. In his "adjustments", Faggen adds "Special Work in Process" presumably as of June 30, 1968 (the date of the adjustment sheet in Exhibit 4), to the adjusted income for 1968, and adds in "Expense items that will not recur" to compute the adjusted 1968 income on an accrual basis through the end of the year (see page 2 of Exhibit 4, Kaufman affidavit). Moreover, each of the corporations portrayed in such memorandum have a different fiscal year end: Employee Fund Service Corp. has "F. Y. End 9/30/67", while Actuarial Tabulating Corp. has "Fiscal Y. End 3/31/68", and Fund S & E Corp. has "F. Y. End 6/30/68", but these differing fiscal years are all grouped together to portray to Titan the 1968 earning power of the Faggen Companies, showing an adjusted total of $571,000 for such year. Pieces of the fiscal years of each corporation had to be put together to present a picture of overall earnings for 1968. The same techniques is used in the selling memorandum (Exhibit 5B, Kaufman affidavit) given to the Board, entitled "Fiscal *Years* Ending In:/1965, 1966, 1967, 1968" (italics supplied). Finally, Exhibit 4 to the Kaufman affidavit,

in Mr. Faggen's handwriting, readjusts the cash basis earning statement to remove cash salaries prepaid through the end of the year, saying they "(Can be treated (i.e. accrued) as loans)" to present plus factors to the cash basis earnings for the year, thus arbitrarily increasing earnings by the deferred portion of one-half year's salaries, and sparing 1968 a full year's charge for recurring salary costs. Mr. Faggen thus again used accrual concepts to portray the entire year's reports in the four Faggen Companies.

Mr. Faggen now says that "The implication in the complaint * * * that the adjustments related to a change from treatment on a cash basis to treatment on an accrual basis is simply wrong" (page 4, Faggen affidavit). He has apparently forgotten his memorandum using the accrual basis to maximize his statement of earnings in 1968, delivered to Mr. Kaufman, and which directly resulted in a purchase price of approximately 10 times $571,000 in adjusted earnings. As shown in the Kaufman affidavit, this Exhibit 4 delivered shortly before October 2, 1968, is the direct antecedent to the handwritten statement of earnings by Faggen made up on or about October 7 and supplied to the Titan Board for the four full years,

showing 1968 as $571,000, and then relied upon at the Board meeting of October 9, 1968 (Exhibit 5A, Kaufman affidavit) to approve the transaction.

9. I am informed by counsel that a representation in writing as to the true earning power of the Faggen Companies, without any explanation as to the method of accounting (cash vs. accrual), underlying assumptions, or the nature of the adjustments being made, was proper ground for reliance by the Titan Board of Directors, particularly when the author was a skilled certified public accountant and lawyer, addressing businessmen. I am further informed that with Mr. Faggen's requiring his transaction to be closed on unaudited financial statements, refusing the suggestion that his books be audited by the Peat, Marwick & Mitchell firm, with Mr. Faggen's reported relationship of trust and confidence with the Chairman of the Board of Titan at the time, Benjamin Robinson, and with Faggen's recognized expertise in matters of accounting, Titan's management had the right to rely on the statements of earning power contained in the selling memorandum, without more.

But something more was provided in the explanation of his adjustment concepts supplied in Exhibit 4 to the

Kaufman affidavit to induce Kaufman to rely upon the $571,000 earning power for 1968. We have reviewed the books and records of the Faggen Companies for the years 1965-1968 to attempt to verify the adjustment concepts set forth in Mr. Faggen's handwritten memorandum of October 2, 1968, and have come up with the following, albeit incomplete, results:

10. The results of these comparisons show that at several points the 1968 adjustments do not accord with their 1972 explanation.

For example, on the 1968 adjustments contained in Exhibit 4 to the Kaufman affidavit, there are two items entitled:

"Salaries Ad. to 12/31/68 (Can be treated as Loans)

Rose 22,950

Geo 13,162"

I am recently informed by accounting personnel in the Faggen Companies who handled the books back in 1968 that in order to reduce federal taxes, and make use of the differing fiscal years of the various Faggen Companies, Mr. Faggen for several years would pay certain employees their annual salary before the end of the fiscal year of a particular corporation, thus reducing its

income substantially at the end of the fiscal year for which a tax return was being prepared. But once such practice is undertaken at the end of each fiscal year, it must be continued on the same basis in order to continue such tax results, so that a whole year's salary would have to be charged in advance at the end of the next fiscal year for the corporation (midway in its calendar year). Treating one-half of this salary prepayment as a credit on Exhibit 4, Kaufman Aff., which increased income in 1968 through the end of the year by treating salaries paid as a loan against services to be performed in 1969, is misleading. It relieves the operating results of the year in question (1968) of their proper charge of a full year's expenses, inflating profits in the one good year 1968. The same total of $36,112 in credits would have to be written off the books on the last day of the next fiscal year of that corporation, whenever that day came, thus reducing cash on hand in advance inthat calendar year. This adjustment is not sound income accounting under generally accepted accounting principles and we have not made it in our four year presentation of pre-tax income in Exhibit E. We gave effect to the actual salary costs of doing business in

each of the four years. The invalidity of Faggen's adjustment might not have been apparent in the one year presentation but was plainly invalid over the four year statement of earning power presented to the Board, without specific disclosure of each illusory adjustment, because the recurring salary costs were there each year.

11. A further point is not only the invalidity of this adjustment, but the fact that this was the type of adjustment outlined to Kaufman in 1968 to justify $571,000 in earning power, *not* salary reductions of other executives as contended in Mr. Faggen's affidavit. These are recent explanations by Mr. Faggen of the adjustments to income which appear to have originated in 1972, and are not set forth on the four year presentation at all.

12. Our analysis may further clarify why in his Motion for Summary Judgment, Mr. Faggen makes no attempt to make any detailed presentation of the adjustment techniques which went into his statement of income for the years 1965 through 1968. His use of vague general language, i.e. "such items as pension contributions, executive salaries, travel and entertainment, etc." speaks volumes as to his inability, or unwillingness, to give precise data for each year by item and amount, justifying the representations.

AFFIDAVIT OF DANIEL G. HATCHER

13. Lastly, the 1968 adjustments in Exhibit 4, Kaufman affidavit, show Faggen increasing 1968 income by $64,000 for alleged overpayments into the pension fund. Our audit shows that over the four year period, Faggen made contributions to the pension fund of:

| | | |
|---|---|---|
| 1965 | - | $21,305 |
| 1966 | - | 33,176 |
| 1967 | - | 69,670 |
| 1968 | - | 64,456 |

Certainly there would be recurring pension plan cost, if not in 1968, most assuredly then in subsequent years. $64,000 multiplied by 10 becomes $640,000! Pension fund charges on an increasing level had been part of Faggen's recurring cost of doing business, and the level of contribution was solely within his power as computing actuary and trustee. Some annual charge, whether the $70,000 in 1967 or the $33,000 in 1966, had to be budgeted for the future, when Titan was paying for a level of earnings being capitalized over the next ten years. Merely adding $64,000 to 1968 earnings, without disclosure or explanation to Kaufman or Titan's Board, was unsound

accounting and we have not given this adjustment any weight in Exhibit E.

Moreover, a $25,000 charge against income for accrued vacation pay (owed to employees) was entirely omitted by Faggen in his earnings presentation to Kaufman and, by inference, to the Board. We were recently informed of this 1968 liability which did not show in the cash and accrual basis presentation of income by Faggen, but which was an unbooked liability accumulated through 1968, arguably chargeable entirely against 1968 income. However, we charged only $10,000 of this sum against the four years in Exhibit E, spreading it over the period to reflect the annual charge in the year incurred in accordance with generally accepted accounting principles.

14. Faggen's adjustments for "Special work in process" of $25,000 back in 1968 are an illusory item of income. To this day, such item never resulted in any income, and is excluded from Exhibit E. Our audit showed this $25,000 to be an unbilled consulting fee for helping a party in a litigation which is still pending. Such an item could hardly be considered regular operating earnings of a recurring nature, justifying multiplying

ne $25,000 by ten times and issuing $250,000 in notes therefor, assuming this unbilled fee is ever collected. We also gave no credit to Faggen's upward adjustment for "expense items that will not recur" of $32,800 (Exhibit 4, Kaufman Aff.) because we could find absolutely no support in accounts or disbursements to give credence to such items and Faggen has given none.

15. Reviewing the negotiations (as related by Mr. Kaufman and Mr. Frank), our continuing difficulties in even getting at the raw data and work papers to perform an audit on the subject years, and the results of review to date as set forth in detail herein, suggests a single conclusion 0 that the adjustments were of dubious validity, were incomplete and were engrafted upon earnings bases for the four years that resulted in overstatements. Pro forma earnings statements are a recognized disclosure technique in prospectuses, proxy statements and other disclosure documents in securities transactions. But they are supposed to be based on generally accepted accounting principles. To the extent they present a picture which is different from normal earnings presentations, they must be consistently prepared and state their underlying assumptions, with a comparative presentation of normal earnings computations.

AFFIDAVIT OF DANIEL G. HATCHER

*Contentions With Respect to Defendant's Motion for Injunctive Relief.*

16. In Mr. Faggen's motion papers he contends that Titan withdrew $2,300,000 from the Faggen Companies since they were acquired and he claims that whatever relief is granted in the instant case, Titan will still be required to pay $2,300,000 to him. Mr. Faggen demands that Titan be required to pay current interest on the $5.5 million in promissory notes or $220,000 per year pending judgment in this action.

Counsel informs me that interest is not necessarily payable on a pool of assets used as the "bait" to induce a larger securities fraud or when damages are unliquidated in amount, and that as a legal matter, interest should not be payable even on the hard value received by Titan, because Faggen could thus profit from his own wrong.

17. But Mr. Faggen's accounting concepts are again inappropriate on this aspect of his motion. At the closing in December 1968, Titan took over a list of securities valued for purposes of the acquisition as of September 30, 1968. A list of these securities is annexed hereto in a memorandum dated April 29, 1969 to accounting

personnel in Titan and the Faggen Companies (Exhibit F). As of September 30, 1968, the closing balance sheet date provided in the contracts, the list of securities had an apparent value of $1,019,000, which increased by December 1968 and subsequently declined.

In addition, 8,000 shares of Titan Group stock owned by the Faggen Companies were transferred with an apparent market value of $114,000, but since these shares became unregistered under the Securities Act of 1933, i.e., "investment stock", when they became effectively owned by the issuing corporation, Titan, their value to Titan was no more than 50% of market value. It is a matter of common knowledge in financial circles that investment bankers, and on occasion, the courts, reduce the value of unregistered shares of stock by 50% of more in determining their actual value. To Titan, obtaining more of its own stock in exchange for notes was hardly a step forward, with an abundance of authorized but unissued stock on hand. Thus, Titan acquired a total of no more than $1,075,000 in securities.

In addition to these securities liquidated later at various times and various prices not necessarily resulting in the September 30, 1968 valuation, Titan apparently

received a total of approximately $750,000 in cash in 1969-1970, after it was operating the Faggen Companies as wholly owned subsidiaries of Titan. Although Faggen does not mention it, Titan later received another $183,000, or a total of $933,000.

18. This excess cash came into the Faggen Companies in 1969-1970 because, among other things, of an approximately $262,000 liquidation of their business and from an additional total of $452,000 in earnings during the two subsequent years. The partial reduction of the Faggen business occurred because certain employees in early 1969 left the employment of Faggen, took accounts of the company, and associated themselves with another actuarial service company. I am informed that upon the threat of a suit these employees agreed to pay some $262,000 for the accounts taken, and acquired ownership of the accounts. Annexed as Exhibit G is a list of the many accounts taken, and a copy of the promissory note provided in payment for these accounts by such employees. While these accounts were never listed as assets on the balance sheet of the Faggen Companies, they were obviously material assets in fact, and the $262,000 in funds derived therefrom was a non-recurring item of income

resulting from liquidation of these assets. If they were really worth more than $262,000 and this was just a settlement figure, Titan may have lost true net worth in the forced sale. It should be noted that Faggen sold these accounts at less than three times their annual return, not at a ten times multiple. In any event, the total thus received by Titan is not the $2,300,000 claimed by Faggen, but approximately $2,000,000, and the liquidation of assets consisting of customer accounts meant a loss of good will in some amount, yet to be proven, which might be a further charge against net worth acquired.

19. Against this assumed receipt of $2,000,000 in value from the Faggen Companies, Titan has paid, to date, $660,000 in interest payments, $42,440 in cash in 1969 as part of the down payment in the transaction, over $185,000 in wages under an employment agreement with Faggen entered into at the closing, and substantial home office overhead for the Faggen Companies. Moreover, Faggen's wife, Rose Dogan, whom he has made a part of all current negotiations for continuation of his employment relationship with the Faggen Companies, has since 1968 received a total in excess of $175,000 herself in

her employee relationship with the Faggen Companies. The total of these cash payments to Faggen (and his wife, Rose Dogan) is approximately $1,100,000, without putting a figure on the home office overhead incurred in trying to keep the Faggen Companies alive over the past two years.

Their earnings went from $260,000 pre-tax in 1969 to $192,000 pre-tax in 1970, and fell to $136,000 pre-tax in 1971. At the writing of this affidavit, I am informed that all the accounts of the Faggen Companies are in jeopardy because of the anticipated termination of Harold Faggen's and Rose Dogan's employment relationship. Many major clients, constituting the bulk of the actuarial business of the Faggen Companies (the only branch that has ever earned a profit), have announced their intention to leave unless Faggen and Rose Dogan remain as consultants to the companies, and indications are that many such clients are planning to leave in any event. Mr. and Mrs. Faggen currently remain on salary on a month-to-month basis at annual stipends of $50,000 and $63,000, respectively, with substantial claims for vacation pay and other employee benefits still unresolved.

In sum, Titan has not received anywhere near the $2,300,000 yield from the Faggen Companies contained in Mr. Faggen's moving affidavit, having received a net sum of barely $900,000 in value and Titan is now facing the possibility of a complete loss on the business of the Faggen Companies as at the writing of this affidavit.

Furthermore, I am informed that this anticipated loss of the clients may be a direct result of recent activities by Mr. Faggen, inducing them to send cancellation of business notices, leading to a claim against him by Titan for mismanagement under his employment contract, improper competition in violation of his restrictive covenant, and operation of other businesses while he was on salary to Titan. The amount of damages involved in this problem is unascertained as yet but most substantial.

20. Finally, Mr. Faggen's financial arrangements with his former wife, outlined in his moving affidavit (page 7, Faggen affidavit) and his substantial borrowings from the Franklin National Bank have posed an additional serious problem to Titan. Out of the $5.5 million in notes sought to be cancelled in this law suit, $2.5 million were transferred to alleged holders in due course many months before this action was brought. The attorneys

for Mrs. Clara Faggen, Mr. Faggen's former wife, I am informed, have asserted their intention of immediately suing Titan as holder in due course to recover $1,500,000 on the very notes sought to be cancelled by this action. Franklin National Bank has indicated the same intention, as communicated to us by Mr. Faggen, on the $1,000,000 in Titan notes which it holds as a result of borrowings by Mr. Faggen over the past two years. Thus, even if Titan prevails in this action against Faggen to cancel all the notes and return back to him the fair cash value of the assets transferred, Titan may still be required to pay these alleged holders in due course a total of $2,500,000 plus accrued interest on the Titan notes they hold. Titan is now exposed to $2,500,000 in additional damages, even if it ultimately prevails in this action.

Titan's only recourse, at that point, would be to seek recovery of such $2,500,000, plus attorneys' fees incurred, as damages, from Mr. Faggen himself, either directly, or by way of setoff against sums concededly owing to Mr. Faggen, representing the fair value of the Faggen Companies in October, 1968. Thus, counsel informs me that Mr. Faggen, in seeking interest payments on all $5.5 million in notes is "seeking equity", but he is

refusing to and may be incapable of "doing equity" to Titan unless he can eliminate Titan's exposure to the alleged holders in due course of these notes. Titan may hold $900,000 in net value, but Titan is exposed to judgment by noteholder for another $2,500,000, and will only be increasing its anticipated net damages in paying $220,000 interest annually while the facts herein are determined. As indicated, the Faggen Companies may be rapidly becoming valueless as a result of Mr. Faggen's reported contacts with key clients and removal of their business, depriving Titan of any residual value in the acquisition which would justify payment of interest *pendente lite*.

Titan seeks rescission and asserts that it would not have acquired the Faggen Companies at all if it knew the true facts. Using a 10 times multiple, the Faggen Companies were worth little more than the discounted value of $2,500,000 payable in 4% subordinated 10 year notes, in 1968 when they were bought, based on an average of 1965 through 1971 earnings, as their true earning power over the period. Moreover, such actual value was payable only in 4% long term subordinated installment notes, not in cash. Faggen's initial equity in the

transaction does not even cover Titan's exposure on the $2,500,000 in notes held by alleged holders in due course, demanding immediate cash payment, and Titan will have done more than equity requires of it when it satisfies their claims in cash, rather than with 4% subordinated notes. After satisfying such claims, Titan will be over $1,600,000 behind on the series of transactions and still have to seek recovery from Faggen, while it tries to salvage a personal service business whose clients may have followed Mr. Faggen and his wife to their next office.

*Conclusion*

21. The earnings of Mr. Faggen's companies were distorted (Exhibit E) and caused the issuance of $5.5 million in notes herein. Mr. Faggen subsequently caused the transfer of $2,500,000 of such notes to potential holders in due course, and has left Titan with a shrinking business and with little hope of recovering more than a small part of the value paid from the assets received. The affidavit of Robert James Frankel, submitted herewith, details the steps leading up to the bringing of this action, and further relevant facts on defendant Faggen's prayer for equitable relief herein.

(Sworn to by Daniel G. Hatcher, Jr., September 11, 1972.)

EXHIBIT A, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

File: Y. Hamp. Faggen Acquisition

TITAN GROUP, INC.

523 FIFTH AVENUE, NEW YORK, N.Y. 10017 ☐ TELEPHONE (212) MO 1-3232

DATE 1/21/69

To: M. Sokolow, J. Levine -- cc: F. Barth (PMM)

From: J. V. Russo

Subject:

This is to advise you of the latest developments re the accounting for the four Faggen Companies acquired by Titan on December 2, 1968. It has been decided definitely not to liquidate Harold Faggen Associates and Fund S & E Corp. Actuarial Tabulating Corp. and Employee Fund Services Corp. will be liquidated, probably some time in January. You will be advised of the exact date early next week.

It is the present intention that all four corporations will file short period returns covering the period from the end of their last fiscal years to December 31, 1968; however, for financial reporting purposes the Corporations will be picked up by Titan as of September 30th. These differences create certain mechanical problems in obtaining the necessary figures which I believe should be resolved as set forth below. The mechanics are perhaps somewhat complex and will require careful attention to the distribution of adjusting entries; however, whatever modifications you may wish to follow in the procedures will create no problem so long as you keep in mind what must be obtained; namely, balance sheets on an accrual basis as of September 30th and December 31st; profit and loss statements for the three months ended December 31st, and short period tax returns covering the period from the last fiscal year-ends to December 31, 1968. Please keep in mind that the papers will be reviewed by PMM and possibly by IRS and the clearer the trail, the better.

1. Trial balances* should be prepared as of September 30, 1968. These trial balances should include balances of the profit and loss accounts on September 30, 1968 covering the periods from the last fiscal year-ends to September 30, 1968. (Of course, with respect to Employee Fund Services Corp., since the fiscal year-end is at September 30, 1968, the problems are a little less difficult.)

2. Second trial balances* should be prepared as of December 31, 1968. These trial balances should include balances of the profit and loss accounts on December 31, 1968 covering the periods from the last fiscal year-ends to December 31, 1968.

EXHIBIT A, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

TITAN GROUP, INC.
520 FIFTH AVENUE, NEW YORK, N.Y. 10017 ☐ TELEPHONE (212) MO 1-3232

DATE 1/21/69

TO: M. Sokolow, J. Levine -- cc: F. Barth (PMM)

FROM: J. V. Russo

SUBJECT:



3. The first adjusting entries that are made on the trial balances should be entries only affecting the cash basis figures. Once all such entries have been made, a final cash basis trial balance should be obtained which should, of course, agree with the books as adjusted since the books will continue to be maintained on a cash basis through December 31, 1968. Adjustments to put the accounts on an accrual basis as of September 30th and December 31st should then be made. (Do not book accrual adjustments.) ✓

4. Once the final accrual basis trial balances have been prepared, the accrual profit and loss account balances appearing on the September 30th trial balances should be brought forward to the December 31st trial balances and deducted from the accrual profit and loss balances thereon in order to obtain the profit and loss operations for the three month period from October 1 to December 31, 1968.

*Since the books are on the cash basis, the first figures will be on this basis.

As to the future method of keeping the books (cash basis versus accrual method of accounting), I am meeting with a member of the PMM tax department on Thursday at which time we will consider the possibility of obtaining a ruling for IRS which would permit us to keep the books of the two continuing corporations on an accrual basis while filing the tax returns on a cash basis. I will advise you of the decision as soon as possible.

EXHIBIT B, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

February 9, 1972

Mr. Joseph Warren
Josepn Warren & Co.
369 Lexington Avenue
New York, New York

Re: Titan Group, Inc.

Dear Mr. Warren:

Pursuant to our telephone conversation of yesterday, as counsel for Titan Group, Inc., I hereby make this written demand upon you that you promptly supply the following described materials to Titan Group, Inc.

1 - Copies of all of your accounting work papers, summaries and related materials for the Harold Faggen group of companies, for the calendar years 1966, 1967 and the nine months ending September 30, 1968.

2 - Copies of the same documents relating to the period October 1, 1968 through December 31, 1968.

3 - Copies of the same mater.. s for the calendar year 1969.

This request is made by Titan Group, Inc. to you as the accountants acting for the corporation during the year 1969 and for the period October 1, 1968 through December 31, 1968, so that the corporation and its certifying accountants can review all of such material prepared by you at its request during such period.

This request is made upon you for the period 1966, 1967 and nine months ending September 30, 1968 pursuant to the several agreements of sale by which the Faggen group companies were sold to Titan Group, Inc. and specifically under paragraph 4.2 of all four agreements relating to the Faggen companies. Such paragraph 4.2 requires that the Seller shall "do such other and further acts as may be necessary in the opinion of Titan's

EXHIBIT B, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

Joseph Warren & Co. February 9, 1972

counsel.....to protect the property of the Company, to aid in the prosecution or defense of other litigation or proceedings in connection with the business of the Company prior to the date hereof [the subject contract], all without further consideration but at the expense of the Company. The Seller [Mr. Faggen] agrees to cooperate and to use Seller's best efforts to have the....other employees of the Company cooperate with Titan at its request and expense after the date hereof in endeavoring to effect the collection of all receivables and other items owing to the Company....and in connection with any other actions, proceedings, arrangements or disputes involving the Company and/or Titan based upon contracts, arrangements or acts of the Company which were in effect or occurred on or prior to the date hereof."

The covenant commonly referred to as a "covenant of further assurances" requires Mr. Faggen to cooperate and use his best efforts to have you supply the aforesaid work papers and accounting summaries. Such covenant is repeated, substantially verbatim, in the agreements of October 1, 1968 with respect to Actuarial Tabulating Corp., Harold Faggen Associates, Inc., Employee Fund Services Corp. and Fund M S & E. Corp.

We are sending a copy of this demand to Mr. Faggen to insure his prompt cooperation in accomplishing delivery of these papers to us. We will be in touch with the Peat Marwick firm and make arraggements for someone from their office to pick up these documents and conduct any further questioning thereon with you.

We appreciate your cooperation with respect to the foregoing.

Very truly yours,

LMP/ms Lawrence M. Powers

cc: Harold Faggen - 853 Bway
Robert James Frankel
Dan Hatcher - Titan, Tampa
[illegible] Executive Park
Louisville Ky

EXHIBIT C, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

JOSEPH WARREN & CO.
CERTIFIED PUBLIC ACCOUNTANT
369 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
OX 7-2225

JOSEPH WARREN, C. P. A.
EUGENE HABER, C. P. A.

February 22, 1972

Lawrence M. Powers, Esq.
Powers and Gross
110 East 59th Street
New York, N. Y. 10022

Re: Titan Group, Inc.

Dear Mr. Powers:

I acknowledge receipt of your letter of February 9, 1972.

I have not replied to your letter prior to this for the reason that I have been awaiting some advice from Harold Faggen. I understand that Mr. Faggen has been ill and in fact, is in the hospital. I assume that that explains why he has not been in communication with me.

Very truly yours,

Joseph Warren

JOSEPH WARREN

JW:vsp
cc: Mr. Harold Faggen

EXHIBIT D, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

SHEIB, SHATZKIN & COOPER
235 EAST 42ND STREET · NEW YORK, N.Y. 10017 · (212) 687-8800

SIMON SHEIB
BERNARD SHATZKIN
BURTON S. COOPER
EDWARD LABATON
SHELDON RUDOFF

BURTON J. LASKY
ALLAN GRAFF
EDWIN L. SMITH

April 17, 1972

Lawrence M. Powers, Esq.
110 E. 59th Street
New York, N. Y.

Dear Larry:

I am advised that Joe Warren has been requested to make available certain books and records allegedly in his possession and that this request was based upon my conversation with you. In our conversation, I indicated that I did not want to speak to you because of the possibility of misunderstanding. Apparently I was correct. What I said was that at all times all of the books of the corporations, acquired by Titan, were and now are in Faggen's office. Thus, they were always in your possession and still are. As a matter of fact, since our conversation I have been advised by Faggen that the books were taken to Kentucky by corporate officials and have recently been returned. You were told that you were free to examine those books at any time up to now and you are certainly free to examine them now. You indicated that you would like to examine the books for the purpose of better understanding the background of the transactions.

Lastly, I said that if after you examined these books you still had questions, you might call me and I would consider whether the questions were appropriate and if they required answers. Our conversations did not involve Joe Warren.

Sincerely yours,

Simon Sheib

SS:vc

EXHIBIT D, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

April 21, 1972

Simon Sheib, Esq.
Sheib, Shatzkin & Cooper
235 East 42nd Street
New York, N. Y. 10017

Dear Si:

I have your letter of April 17, 1972. Please allow me to clarify the formal requests that are pending between Titan Group, Inc., your client, Harold Faggen and Joseph Warren.

1. Joseph Warren stated to me in a telephone conversation, and repeated to Dan Hatcher in other telephone conversations, that he had work papers, memoranda and other financial information relating to the operations of the Faggen companies for the years 1965 through 1969. He stated that these files were segregated and kept in folders, and were available for release to Titan Group, Inc. if Mr. Faggen allowed him to release such information. Those documents belong to Titan Group, Inc., we want them delivered now, and delivered in a cooperative and explanatory spirit by Mr. Warren.

   Mr. Warren has indicated a willingness to deliver the documents unless instructed not to do so by Harold Faggen or you. If we do not receive the documents requested from Mr. Warren, or there is any lack of openness or cooperation on the subject, we will institute appropriate litigation to compel their disclosure, against Mr. Warren and Mr. Faggen.

   Your telling me there are no such papers is contrary to the statements of Mr. Warren made directly to me. I cannot accept anything less than compliance with our proper and reasonable request.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

Simon Sheib, Esq. April 21, 1972

2. Ledger material and certain supporting data has been made available to Dan Hatcher, part of it before our conversation in my office and a great deal of additional material after our conversation. These were all present at the offices of the Faggen companies, and as you pointed out, these have been and are the property of Titan Group, Inc. However, there may be additional work sheets, memoranda or data which Dan Hatcher has not been permitted to inspect, and we will keep you posted on any specific additional items not received.

Until our meeting, Mr. Faggen had instructed internal personnel in the Faggen companies to withhold this basic information from Titan Group, Inc. accounting personnel, notwithstanding it being the corporation's property. As a result of a visit to the premises when Mr. Faggen was in the hospital, the general ledgers were obtained. Thereafter, as a result of your conference with me, in which I showed you a memorandum from Mr. Faggen in 1968 which was the subject of our controversy, working papers and other supporting financial memoranda were made available to Titan's Louisville accounting office. Your cooperation was appreciated.

I trust the foregoing clarifies the record between us and I will be contacting you if there are further unanswered questions on these matters.

Sincerely yours,

Lawrence M. Powers

LMP/ms

cc: Robert Frankel
Dan Hatcher

# EXHIBIT E, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

## HAROLD FAGGEN ASSOCIATES, INC. AND COMPANIES

Net Income - Pre-Tax
Adjusted to Basis Which Prevailed
After Acquisition

| | Fiscal Years Ending During | | | |
|---|---|---|---|---|
| | 1965 | 1966 | 1967 | 1968 |
| Cash basis income statements: | | | | |
| Harold Faggen Associates, Inc. (June 30) Exhibit E-1 | $105,033 | $170,396 | $109,215 | $161,824 |
| Actuarial Tabulating Corp. (March 31) Exhibit E-2 | 27,741 | 28,160 | 27,591 | 28,918 |
| Employee Fund Services Corp. (September 30) Exhibit E-3 | 22,675 | 17,526 | 16,879 | 19,101 |
| Fund S & E Corp. (June 30) Exhibit E-4 | | | | 7,412 |
| Total net income | 155,449 | 216,082 | 153,685 | 217,255 |
| Accrual adjustments to convert from cash to accrual method: | | | | |
| Fees and retainers | ( 32,053) | ( 39,871) | 20,655 | ( 1,523) |
| Vacation pay | ( 1,000) | ( 2,000) | ( 3,000) | ( 4,000) |
| | ( 33,053) | ( 41,871) | 17,655 | ( 5,523) |
| Net income after taxes - accrual basis | 122,396 | 174,211 | 171,340 | 211,732 |
| Faggen's proposed pro forma adjustments: | | | | |
| Add back federal, state, and city taxes | 128,491 | 155,210 | 132,637 | 170,786 |
| Accounting services income | 34,800 | 34,800 | 35,240 | 35,280 |
| Deduct investment income | ( 36,377) | ( 78,582) | ( 30,522) | ( 51,777) |
| Reduction in Harold Faggen's salary ($50,000 limit) | 12,000 | 17,700 | 27,700 | 37,700 |
| | 138,914 | 129,128 | 165,055 | 191,989 |
| Total adjusted net income - pre-tax per Titan audit | 261,310 | 303,339 | 336,395 | 403,721 |
| Total represented net income - pre-tax per Faggen | 380,802 | 490,754 | 451,085 | 571,262 |
| Overstatement | $119,492 | $187,415 | $115,490 | $167,541 |

EXHIBIT E

# EXHIBIT E, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

## HAROLD FAGGEN ASSOCIATES, INC.

Cash Basis Income Statements
Years Ended June 30

| | 1965 | 1966 | 1967 | 1968 |
|---|---|---|---|---|
| **Revenues:** | | | | |
| Fees and retainers | $705,260 | $778,064 | $842,490 | $918,820 |
| Dividends received | 7,480 | 9,730 | 11,120 | 12,639 |
| Interest income | 5,382 | 4,076 | 7,960 | 7,599 |
| Gain or (loss) on sale of: | | | | |
| Equipment | ( 601) | | | ( 645) |
| Investments | 5,726 | 41,717 | | 15,364 |
| Total revenues | 723,247 | 833,587 | 861,570 | 953,777 |
| **Costs and expenses:** | | | | |
| Salaries | 319,841 | 356,254 | 419,843 | 427,861 |
| Pension fund contributions | 15,832 | 27,703 | 64,197 | 58,108 |
| Employee benefits and union | 39,665 | 1,908 | 22,369 | 2,673 |
| Payroll taxes | 8,589 | 9,744 | 11,198 | 10,495 |
| Rent and maintenance | 27,978 | 26,432 | 27,193 | 27,651 |
| Office machines-rentals | 21,452 | 13,208 | 8,620 | 21,155 |
| Office supplies | 10,952 | 12,071 | 18,925 | 26,405 |
| Travel and entertainment | 25,075 | 31,584 | 25,850 | 29,511 |
| Insurance | 4,419 | 5,856 | 6,079 | 5,758 |
| Depreciation | 5,627 | 10,614 | 9,937 | 6,872 |
| Promotion | 5,626 | 4,100 | 3,206 | 4,480 |
| Telephone and telegraph | 5,745 | 6,147 | 5,771 | 5,994 |
| Professional fees | 9,900 | 9,900 | 3,850 | 4,950 |
| State and local corporate taxes | 26,055 | 14,114 | 31,284 | 14,820 |
| Other taxes | 1,152 | 2,215 | 1,042 | 1,384 |
| Miscellaneous | 10,107 | 11,955 | 13,823 | 15,355 |
| Total costs and expenses | 536,015 | 543,805 | 673,187 | 663,472 |
| Profit before federal income taxes | 187,232 | 289,782 | 188,383 | 290,305 |
| Federal income taxes | 82,199 | 119,386 | 79,168 | 128,481 |
| Net income | $105,033 | $170,396 | $109,215 | $161,824 |

EXHIBIT E-1

EXHIBIT E, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

ACTUARIAL TABULATING CORPORATION

Cash Basis Income Statements
Years Ended March 31

| | 1965 | 1966 | 1967 | 1968 |
|---|---|---|---|---|
| Revenues: | | | | |
| Fees and retainers | $ 71,492 | $ 64,755 | $ 74,030 | $ 80,090 |
| Dividends received | 3,067 | 3,143 | 4,019 | 4,941 |
| Interest income | 1,233 | 2,240 | 1,189 | 1,125 |
| Gain (loss) on sale of investments | 6,596 | 12,179 | 2,606 | 4,690 |
| Total revenues | 82,388 | 82,317 | 81,844 | 90,846 |
| Costs and expenses: | | | | |
| Salaries | 27,048 | 27,747 | 29,222 | 37,026 |
| Pension fund contributions | 5,473 | 5,473 | 5,473 | 6,348 |
| Employee benefits and union | 1,190 | 1,337 | 1,589 | 1,861 |
| Payroll taxes | 694 | 951 | 1,044 | 896 |
| Rent and maintenance | 2,400 | | | |
| Office supplies | | | 26 | 143 |
| Insurance | 99 | 594 | 110 | 158 |
| Professional fees | 3,000 | 2,700 | 2,950 | 450 |
| State and local corporate taxes | 3,761 | 3,829 | 2,190 | 3,814 |
| Other taxes | 2 | 2 | 2 | 2 |
| Miscellaneous | 128 | 99 | 100 | 103 |
| Total costs and expenses | 43,795 | 44,732 | 42,706 | 50,801 |
| Profit before federal income taxes | 38,593 | 37,585 | 39,138 | 40,045 |
| Federal income taxes | 10,852 | 9,425 | 11,547 | 11,127 |
| Net income | $ 27,741 | $ 28,160 | $ 27,591 | $ 28,918 |

EXHIBIT E-2

EXHIBIT E, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

## EMPLOYEE FUND SERVICES CORPORATION

Cash Basis Income Statements
Years Ended September 30

| | 1965 | 1966 | 1967 | 1968 |
|---|---|---|---|---|
| Revenues: | | | | |
| Fees and retainers | $ 26,000 | $ 22,507 | $ 22,656 | $ 24,123 |
| Dividends received | 1,352 | 1,268 | 1,474 | 2,800 |
| Interest income | 1,189 | 725 | 2,017 | 750 |
| Gain (loss) on sale of investments | 4,352 | 3,504 | -136 | 1,810 |
| Total revenues | 32,893 | 28,004 | 26,283 | 29,483 |
| Costs and expenses: | | | | |
| Professional fees | 900 | 900 | 900 | 900 |
| State and local corporate taxes | 857 | 2,966 | 2,755 | 2,621 |
| Other taxes | 86 | 95 | 2 | 2 |
| Miscellaneous | 40 | 17 | 55 | |
| Total costs and expenses | 1,883 | 3,978 | 3,712 | 3,523 |
| Profit before federal income taxes | 31,010 | 24,026 | 22,571 | 25,960 |
| Federal income taxes | 8,335 | 6,500 | 5,692 | 6,859 |
| Net income | $ 22,675 | $ 17,526 | $ 16,879 | $ 19,101 |

EXHIBIT E-3

# EXHIBIT E, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

## FUND S & E CORPORATION

Cash Basis Income Statements
Years Ended June 30, 1968

| | 1965 | 1966 | 1967 | 1968 |
|---|---|---|---|---|
| Revenues: | | | | |
| Fees and retainers | | | | $ 10,499 |
| Dividends received | | | | 60 |
| Total revenues | | NONE | | 10,559 |
| Professional fees expense | | | | 83 |
| Profit before federal income taxes | | | | 10,476 |
| Federal income taxes | | | | 3,064 |
| Net income | | | | $ 7,412 |

EXHIBIT E-4

EXHIBIT F, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

TITAN GROUP, INC.
620 FIFTH AVENUE, NEW YORK, N.Y. 10017 ☐ TELEPHONE (212) MO 1-3232

DATE April 29, 1969

TO: J. SPENCE, R. K. MC INTYRE -- cc: J. Levine, A. Mitchell, M. Hampson, M. Ro

FROM: J. V. RUSSO

SUBJECT:

We have prepared as of February 12, 1969 the appropriate journal entries to accomplish the following: 1) Liquidate Employee Fund Service Corp. and Actuarial Tab Corp.; 2) transfer the securities held by these two corporations to TGI; and 3) transfer to TGI by dividend the securities held by Harold Faggen Associates, Inc. and Fund S & E Corporation.

All securities of all four corporations were transferred to Titan with the exception of the U. S. Treasury notes. In all cases, the market value of the securities as of September 30, 1969 was used to record the securities on Titan's books since, in effect, this was Titan's true cost basis. The securities are in the possession of Titan and RKM is having them put in the name of Titan. The cut-off date (TGI vs. Faggen Corps.) as to the pick-up of dividend income on the above is February 12t With respect to interest income, for the sake of simplicity, any interest accrued at the date of transfer of bonds to Titan will, when collected, be recorded as income on the Faggen books.

It should be noted that the tax basis of the marketable securities in the hands of Titan will be different from the book basis. (Alex Mitchell will compute the tax basis.) The Federal Income tax accrual set-up by consolidation entry at the year-en on the basis of the difference between the September 30th market values of the securities and the cost basis thereof to Faggen has been incorporated into the journal entries recorded by TGI in picking up the securities. However, the accrual will have to be revised upon computation of the tax basis of the securities to TGI.

Attached is a schedule of the securities transferred. As noted above, the value on TGI's books represents the September 30th market value.

| | Value on TGI's Books | Cost to Faggen Co's |
|---|---|---|
| Harold Faggen Associates | $ 744,676.73 | 562,002.91 |
| Employee Fund Service Corporation | 70,851.32 | 66,566.00 |
| Actuarial Tabulating Corporation | 196,689.16 | 136,657.04 |
| Fund S & E Corporation | 6,962.50 | 6,770.73 |
| Total | $ 1,019,179.71 | 771.996.68 |

EXHIBIT F, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

TITAN GROUP, INC.
520 FIFTH AVENUE, NEW YORK, N.Y. 10017 ☐ TELEPHONE (212) MO 1-3232

DATE April 29, 1969

TO: J. SPENCE, R. K. MC INTYRE -- cc: J. Levine, M. Hampson, M. Rosen

FROM: J. V. RUSSO

SUBJECT:

Page 2

The name of the bank accounts of Act Tab and Employee Fund S & E Corp. should be changed to eliminate any reference to their being separate corporations. Joe Levine should obtain from the banks the appropriate bank resolutions required to effect this change.

P. S. Pending transfer of securities into the name of Titan, all dividend and interest checks received by the Faggen division will be endorsed over to TGI and forwarded to corporate accounting which will have the responsibility of accounting for the securities and income therefrom. In this connection, investment ledgers or appropriate workpapers will be maintained by corporate accounting.

# EXHIBIT F, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

Schedule of Marketable Securities Transferred
to Titan Group, Inc. from Faggen Corporations
by Dividend or Through Liquidation
On February 12, 1969

| | No. of Shares or Face Value | Value on TGI's Books* | Cost to Faggen Co. |
|---|---|---|---|
| **Bonds:** | | | |
| Allied Stores - 4.5% 9/15/92 | $ 10,000.00 | $ 10,825.00 | 10,000.00 |
| So Calif. Edison - 3 1/8% 8/15/80 | 50,000.00 | 42,500.00 | 51,375.00 |
| Vinson & Co., Inc. - 6½% 9/15/88 | 50,000.00 | 38,573.61 | 38,375.00 |
| **Stocks:** | | | |
| Allis Chalmers | 333 | 9,990.00 | 9,988.08 |
| American Tel. & Tel. | 400 | 21,150.00 | 26,932.75 |
| Argonaut Ins. Co. | 1,000 | 34,500.00 | 17,568.28 |
| Ashland Oil & Ref. | 322 | 14,932.75 | 5,312.42 |
| Baltimore Gas & Electric Com | 1,041 | 34,353.00 | 35,977.55 |
| " " " Cv. Cum Pfd. | 21 | 2,362.50 | 2,101.23 |
| Burroughs Adding Mach. Corp. | 123 | 28,059.37 | 3,808.13 |
| Diamond Int'l. Corp. | 200 | 9,025.00 | 7,274.00 |
| Financial Gen. Corp. | 646 | 11,142.41 | 3,008.60 |
| Financial Security Corp. | 646 | 8,237.59 | 2,224.25 |
| First Charter Financial Corp. | 640 | 24,102.05 | 14,713.81 |
| Ford Motor Co. | 100 | 5,700.00 | 5,050.00 |
| Gen. Acceptance Corp. 6.50 Cum. Pfd. | 200 | 16,000.00 | 18,696.60 |
| Gen. Motors | 300 | 24,900.00 | 23,046.33 |
| Gen. Tel. & Elec. | 200 | 8,225.00 | 5,364.50 |
| Honeywell Inc. | 100 | 12,750.00 | 7,332.81 |
| Household Fin. | 440 | 19,910.00 | 8,988.88 |
| Inland Steel | 900 | 32,850.00 | 35,308.33 |
| Investors Fund Corp. of N. Y. | 596 | 10,641.54 | 6,106.30 |
| Katy Ind. | 1,000 | 21,875.00 | 25,289.88 |
| Lehman Corp. | 2,897.135 | 71,239.89 | 46,420.08 |
| McLean Trucking | 900 | 47,587.50 | 31,815.95 |
| Midwestern Financial Corp. | 10,000 | 100,000.00 | 36,000.00 |
| Minn. Mining & Mfg. Co. | 100 | 10,325.00 | 7,690.84 |
| National Steel Corp. | 200 | 9,375.00 | 8,480.00 |
| Pacific Northwest Bell | 1,148 | 20,664.00 | 27,256.28 |
| Penn Central | 600 | 41,775.00 | 27,851.55 |
| Perini Corp. | 3,000 | 27,000.00 | 19,639.97 |
| R.C.A. | 200 | 9,925.00 | 9,459.88 |
| Security Title & Guaranty Co. | 1,000 | 7,250.00 | 9,049.35 |
| Southern Railway | 400 | 23,650.00 | 18,942.48 |
| Standard Oil Co. of N. J. | 400 | 31,100.00 | 28,092.17 |
| Sterling Drugs | 450 | 16,050.00 | 15,920.25 |
| Tri-Cont. Corp. | 2,424.738 | 80,594.50 | 66,146.85 |
| Union Oil of Calif. | 400 | 35,100.00 | 25,681.30 |
| U. S. Steel | 300 | 12,900.00 | 11,400.94 |
| United Utilities | 924 | 23,793.00 | 11,857.20 |
| Beneficial Fin. Co. - Comm. | 76 | 3,743.00 | 2,857.07 |
| " " " - $4.30 Cum. Cv. Pfd. | 57 | 4,503.00 | 3,791.65 |
| Total | | $ 1,019,179.71 | 771,996.68 |

*Represents market value on September 30, 1968 effective acquisition date of Faggen Corporations by Titan Group, Inc. The above schedule does not include 8,000 shares of Titan Group stock transferred (cost $55,620.76) (market value $114,000.00).

# EXHIBIT G, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

HAROLD FAGEN ASSOCIATES INC.
SCHEDULE OF ACCOUNTS TAKEN BY LEVIN TOWNSEND

Mail by 1-1-69

| | Annual Fee |
|---|---|
| Blasters, Drillrunners + Miners Union Loc 29 Pension Fund | 1200. |
| Blasters, Drillrunners + Miners Union Loc 29 Welfare Fund | 1200. |
| Bricklayers, Masons + Plasterers Loc 43 Pension Fund | 745. |
| Bricklayers, Masons + Plasterers Loc 43 Welfare Fund | 745. |
| Central N.Y. Building Industry Apprenticeship + Welfare Fund | 350. |
| Cake Bakers Union Welfare Fund | 500. |
| Candy + Confectionery Workers Local 452 Pension Fund | 3000. |
| Pension Fund of the Intl Union of Oper. Engrs Locals 14, 14B, 15, 15A, 15C + 15D | 10500. |
| Welfare Fund of the Intl Union of Oper. Engrs Locals 14, 14B, 15, 15A, 15C + 15D | 10000. |
| Operating Engineers Local 126 Welfare Fund | 1500. |
| Operating Engineers Local 126 Pension Fund | 1500. |
| Retirement Fund, Operating Engineers Local 138 | 600. |
| Operating Engineers Local 94 + 94A Welfare Fund | 2500. |
| Operating Engineers Local 478 Welfare Fund | 4500. |
| Operating Engineers Local 478 Pension Fund | 4500. |
| Supplemental Unemployment Benefit Fund, Oper. Engrs Loc 478 | 3000. |
| Hotel + Restaurant Employees + Bartenders Union Loc 120, Welfare | 750. |
| Rochester Hotel + Restaurant Employees Union Pension Fund | 750. |
| Rochester Hotel + Restaurant Employees Union Insurance Fund | 1750. |
| House Wreckers Union Local 95 Pension Fund | 2400. |
| Motion Picture Laboratory Technicians Local 769 Pension Fund | 4000. |
| New York Philharmonic Orchestra | 1000. |
| Metropolitan Opera Orchestra | 1000. |
| Riverside Road Building Dist Council Pension Fund | 3500. |
| Riverside Road Building Dist Council Welfare Fund | 3500. |
| Plumbing + Pipefitting Local 79 Pension Fund | 950. |
| Plumbing + Pipefitting Local 79 Welfare Fund | 750. |
| Pension Plan for Employees of Motor Dept of N.Y.S. Racing Assn | 1000. |
| Local 342 Steamfitters Industry Pension Fund | 3500. |
| Local 517 Pension Fund | 1000. |
| N.Y.S. Teamsters Conf. Pension + Retirement Fund | 17500. |
| N.Y.S. Teamsters Council Welfare Trust Fund | 11000. |
| | 113 [illegible] |
| | 86 [illegible] |

EXHIBIT G, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

INSTALLMENT NOTE DUE DECEMBER 20, 1969

New York, New York
April 15, 1969

$262,000

FOR VALUE RECEIVED, the undersigned hereby promises to pay to HAROLD FAGGEN ASSOCIATES, INC., a New York corporation with offices at 853 Broadway, New York, New York, or order, the sum of Two Hundred Sixty-Two Thousand Dollars ($262,000), without interest, in installments of $125,000 on the date hereof, $68,500 on or before September 20, 1969, and a final installment of $68,500 on or before December 20, 1969. The undersigned may at any time prior to December 20, 1969, prepay the entire principal amount of this Note without premium or penalty. Payment of this Note shall be made at the offices of Robinson, Silverman, Pearce, Borden & Ball, 230 Park Avenue, New York, New York, in lawful money of the United States of America. In the event that the undersigned has not paid any installment of this Note when due, the entire unpaid principal amount of this Note shall immediately become due and payable and the undersigned shall pay interest at the rate of 10% per annum from the date of any default in the payment of any installment hereunder on the unpaid principal

EXHIBIT G, ANNEXED TO AFFIDAVIT OF DANIEL G. HATCHER, JR.

of this Note until the entire principal amount of this Note has been fully satisfied and shall pay the reasonable attorney fees of the holder of this Note.

RUSSELL M. TOLLEY ASSOCIATES, INC.

By_____

(Corporate Seal)

AFFIDAVIT OF ANTHONY M. FRANK IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND INJUNCTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of California,

County of Los Angeles, ss:

ANTHONY M. FRANK, being duly sworn, deposes and says:

1. I am a business executive and was President of Titan Group, Inc. ("Titan") from March, 1968 through January, 1970, during which period the acquisition of the companies owned by Harold Faggen (the "Faggen Companies") was negotiated and concluded. I am presently employed as an executive by a financial company based in San Francisco, and am neither a shareholder nor employee of Titan. I have no interest in the outcome of this litigation, but expect to be called as a principal witness therein. Currently my only financial relationship with Titan is that they are paying off to me an accrued compensation item from my previous employment, and they currently owe me some $5,000 which they have promised to pay.

AFFIDAVIT OF ANTHONY M. FRANK

2. I have reviewed the affidavit of Edmund M. Kaufman with respect to the negotiations leading up to the acquisition of the Faggen Companies, and with respect to the elements therein with which I am personally familiar, I confirm that such affidavit is true and complete. The descriptions of the negotiations leading up to the acquisition of the Faggen Companies, and our reliance on a stated earning power of $571,000 for the year 1968 as the key element in determining the price to be paid for the Faggen Companies, is accurate in all respects known to me.

3. The descriptions of the Chairman of the Board of Titan, Benjamin M. Robinson, suggesting to us the acquisition in 1968, and the occurrence of several meetings between me and Harold Faggen to discuss this acquisition is accurate. From the first, I was let to believe that the Faggen Companies had earning power of more than $550,000 per year on a pre-tax basis. During these negotiations, when Benjamin Robinson related the personal reaction of Harold Faggen to me, that we had "hit it off", and that "Harold was ready to write up his Company and tell its earnings", I had the impression that both

Mr. Robinson and Mr. Faggen were quite interested in making the deal. Benjamin Robinson pointed out to me that Harold Fagen was a client of his law firm and that on several occasions he and his firm had brought actuarial clients to Faggen. I further recall that the relationship between Benjamin Robinson and Harold Faggen was sufficiently close so that it was Mr. Robinson who helped Mr. Faggen select an attorney to represent him in this transaction and that Simon Sheib was recommended to Mr. Faggen by our Chairman of the Board, Benjamin Robinson. The transaction was done on a high level of friendliness and confidence in Mr. Faggen's statements as a practicing accountant and former lawyer, and further based upon Mr. Robinson's long acquaintance with him and trust in Mr. Faggen.

4. I recall that in the initial negotiations Harold Faggen wanted between $7 million and $8 million in Titan common stock for his companies and that Edmund Kaufman negotiated him down to the ten times multiple on at least $550,000 in annual earnings, represented by Faggen in our discussions. At the time there was a definite expectation that the earnings would continue at least at such level.

5. I recall receiving a copy of Exhibit 5B to the Kaufman affidavit, Mr. Faggen's selling memorandum (which is Exhibit 1 to the complaint in this action). I read and relied upon it, particularly the statements of earning power for the four years described therein. These basic figures had been talked about by Harold Faggen prior to his writing up the memorandum, and while he had made some statements about various savings, such as pension overfunding, which would occur after the acquisition, they were never tied specifically into these numbers. I accepted his statements of earning power for the four years as hard numbers, without most of the adjustments built in which he has referred to in his affidavit in vague terms. I assumed that any future savings in travel and entertainment expenses or other savings from the tightening up when the Faggen Companies became subsidiaries of a publicly-held company would only increase earnings. I had no idea that Harold Faggen had a set of unspecified savings and adjustments in mind ("travel and entertainment expenses", "executive salaries"), when he presented the "Net Income - Pre-Tax" which is part of Exhibit 5B to

the Kaufman affidavit. He now states in his 1972 affidavit that he had detailed assumptions, itemized by amount, in mind for these net income figures, and that they were "adjusted to reflect the elimination of expenses (with respect to such items as pension contributions, executive salaries, travel and entertainment expenses, etc.)". (Faggen moving affidavit, page 3). If such assumptions were indeed in Mr. Faggen's mind, they certainly were never communicated to me (except for pension overfunding) or to any other member of the Board of Titan in October 1968, when we made the decision to buy his companies for $5.5 million in notes.

6. I am informed by Titan's counsel that the former Chairman of the Board of Titan, Benjamin Robinson, who continued as a director of Titan, and a close friend of Mr. Faggen, was informed at a Titan board meeting in April, 1972 of the basis for bringing this action to set aside the acquisition, because of the unsubstantiated restatement of earning power in the selling memorandum (Exhibit 5B, Kaufman affidavit). Titan's counsel have shown me a letter from Benjamin Robinson dated April 10,

1972 relating a conversation with Harold Faggen on this subject, following such board meeting, where Mr. Faggen's justification for the difference between the represented earning power and the actual earning power in these four years is reported by Mr. Robinson as follows:

> "I was quickly reminded that the 'adjusted figures' in the memorandum for the years prior to acquisition referred to (1) Harold's salary cut from $125,000 to $50,000 per year (2) stopping payments, about $58,000 a year, into their pension fund which was overfunded (3) a group of items including a cut in Rose's salary which added up to over $30,000 as I recall. These cuts were in fact made. Of course these proposed adjustments would not show up in records of prior years. Harold said no one ever asked him to explain these differentials" (Exhibit I, Letter is annexed hereto).

7. These statements in April 1972 by Mr. Faggen seem to say he had no duty to come forward and explain the accounting "adjustments" that went into his representations of pre-tax earning power because "no one ever asked him to explain" these differentials. In reviewing Mr. Kaufman's affidavit and particularly Exhibit 4, where Faggen's explanation of the adjustments for 1968 (and presumably the three prior years) is clearly set forth, I note that the stated adjustments make no mention of adjustments for salary cuts, or any unspecified "group of items" referred to by Mr. Faggen in the above letter. And this Exhibit 4 in Faggen's handwriting (annexed to the Kaufman affidavit) does not mention cutting "Rose's salary" or stopping pension fund payments altogether; it mentions only a 1968 income credit for "Pension Prepayment". Furthermore, Mr. Faggen's 1972 affidavit in support of his motion makes reference to elimination of "travel and entertainment expenses, etc.", which is not included as an adjustment figure in Exhibit 4 to the Kaufman affidavit, was not apparently mentioned to Robinson in the recent meeting quoted above, and was certainly never communicated to me during the

negotiations in September and October 1968. These 1972 explanations by Harold Faggen are inconsistent with the meaning and import which we in Titan gave to the Net Income - Pre-Tax figures presented to us in his selling memorandum (Exhibit 5B to Kaufman affidavit).

8. This selling memorandum was an integral part of the presentation of the transaction to the Board of Directors of Titan on October 9, 1968. It was prepared specifically for that meeting so that the transaction and its pricing could be explained to the Board, and we all relied on such selling memorandum. The copy of the minutes annexed to Mr. Kaufman's affidavit (Exhibit 6) is accurate indicating I was present at the meeting and that I explained the Faggen transaction to the Board. Most of my explanation at such board meeting was based upon his selling memorandum.

9. Once the transaction was approved, so far as I was concerned it was a matter of technical mechanics among the lawyers. I took no responsibility for the contracts prepared, relying on counsel,

Benjamin Robinson, throughout. When, shortly before the closing of the transaction on December 1, 1968, accounting statements of Joseph Warren & Co. were supplied on behalf of Faggen they were considered to be merely his tax saving presentation to the Internal Revenue Service; the statements for 1967, 1966 and 1965 were not normal income statements, being just xerox copies of his tax returns, and were given no substantive significance in our transaction. Mr. Faggen, a highly expert accounting and tax advisor, had prepared an unaudited presentation of his earning power, supplied it to Mr. Kaufman showing how the sum in the latest tax return becomes $571,000 pre-tax after certain adjustments, and supplied the same income figure to the Board along with adjusted income figures for prior years, and we had relied on it. As Mr. Faggen was a friend and business associate of our Chairman of the Board, Benjamin Robinson, of long standing, I had no reason to doubt the logical consistency or accuracy of the presentation of earning power for four years which Mr. Faggen had submitted to us.

AFFIDAVIT OF ANTHONY M. FRANK

10. As the deal was approaching closing, I recall suggesting that an audit of the books and records of the Faggen Companies should be undertaken by the Peat, Marwich & Mitchell accounting firm which was the certifying accountant for Titan at the time. When the request to have an audit prior to the closing was presented to Harold Faggen he adamantly refused to go along with such procedure. The reason he gave was that the Peat, Marwich & Mitchell firm was rendering pension fund advisory services to its clients throughout the country and was a competitor to the Faggen Companies. He did not want our auditing firm to get into the books of the Faggen Companies on this ground and refused an audit. His refusal to permit an audit, in light of his standing and accounting expertise, of course, put the full burden upon the reliability and veracity of his statement of "Net Earnings - Pre-Tax" to prevail after the acquisition. Because Mr. Faggen was unwilling to permit an audit, his unaudited figures were taken with that much more seriousness, and relied upon entirely by the Titan management in closing the transaction. During these

conversations in which he refused an audit, I recall several statements by Chairman of the Board Benjamin Robinson as to the reliability and honesty of Harold Faggen, and that his unaudited figures presented to us were dependable.

11. After the transaction was closed, Mr. Faggen told me that he had just cut Rose Dogan's salary because her earnings were inappropriate as a secondary executive in the Faggen Companies when I, as President of the Titan parent corporation was only receiving $50,000 annual salary. On this basis explained to me, Mr. Faggen voluntarily cut Rose Dogan's salary to $45,000. I do not recall what salary she was receiving previously. However, the explanation for the "adjusted figures" as "including a cut in Rose's salary" (Exhibit I relating recent statements in justification by Mr. Faggen) is an attempt to put an after-the-fact occurrence carried out on a voluntary basis by Harold Faggen as an intention before the acquisition. Rose Dogan's salary was never discussed with me or anyone else in Titan before the acquisition and would appear to be a 1972 explanation

for unsubstantiated adjustments made in 1968 by Mr. Faggen. Some months after this acquisition, Rose Dogan, who had been employed in the Faggen Companies for many years, became Mr. Faggen's wife. Prior to the transaction I had no reason to consider her an integral element in the compensation package being discussed with Mr. Faggen, and adjustments in her salary were never discussed prior to the transaction.

12. In sum, the outline of the negotiations, and our reliance on the selling memorandum annexed to the complaint herein is as stated in Mr. Kaufman's affidavit. I left Titan early in 1970 and had no further contact with the Faggen transaction until the investigation just prior to the bringing of this law suit, wherein I answered questions posed to me by Titan's attorneys as they tried to establish the sequence of negotiations back in September and October of 1968.

(Sworn to by Anthony M. Frank, July 30th, 1972.)

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF ANTHONY M. FRANK.

ROBINSON, SILVERMAN, PEARCE, ARONSOHN, SAND & BERMAN
230 PARK AVENUE
NEW YORK, N. Y. 10017
(212) MU 8-7700
CABLE: "ROSILPE"

WASHINGTON OFFICE
888 16TH STREET, N.W.
WASHINGTON, D.C. 20006
(202) 296-7272
MEMBER WASHINGTON, D.C. BAR ONLY

April 10, 1972

Mr. Robert James Frankel
Titan Group, Inc.
1325 Inwood Terrace
Fort Lee, New Jersey 07024

Re: Titan

Dear Bob:

Pursuant to the request made by you at the Board meeting, I saw Harold Faggen at his home on Sunday briefly. He is still recuperating.

I was quickly reminded that the "adjusted figures" in the memorandum for the years prior to acquisition referred to (1) Harold's salary cut from $125,000 to $50,000 per year (2) stopping payments, about $58,000 a year, into their pension fund which was overfunded (3) a group of items including a cut in Rose's salary which added up to over $30,000 as I recall. These cuts were in fact made. Of course these proposed adjustments would not show up in records of prior years. Harold said no one ever asked him to explain these differentials.

I also advised Harold that there was a strong feeling that various early records were being withheld. He strongly denies this, and says all records have been made available. In fact, he says a few months ago Titan's comptroller examined these records and, he thinks, made xerox copies of whatever he wanted. In addition various original records were taken to Louisville, he says.

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF ANTHONY M. FRANK

ROBINSON, SILVERMAN, PEARCE, ARONSOHN, SAND & BERMAN



It appears to me that the present controversy and especially the basis of Power's recommendation is grounded in misunderstandings. It would be tragic if litigation of such major consequences to the corporation proceeded upon the basis of misunderstandings which can so easily be cleared up.

I have suggested to Harold that he speak to his counsel concerning a meeting between his counsel and Powers so that at least the facts may be set forth. Scheib is out of town until at least Wednesday I am told. He may want to speak to me first, and unless I hear from you to the contrary I will assume I may do so. My only function, I repeat, is to help get the facts on the table.

Sincerely,

Benjamin M. Robinson

BMR:ep

cc: Lawrence M. Powers, Esq.
Alvin Kendis, Esq.

AFFIDAVIT OF ROBERT JAMES FRANKEL IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND INJUNCTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,

County of New York, ss:

ROBERT JAMES FRANKEL, being duly sworn, deposes and says:

1. I am presently Chairman of the Board and Chief Executive Officer of Titan Group, Inc. ("Titan"), and acting in conjunction with our present Executive Committee and Board of Directors, am seeking to rescind, or obtain damages resulting from, the acquisition of the Faggen Companies. Our grounds are that Harold Faggen misled the Board of Directors of Titan in office in 1968 into making this acquisition, based upon artificially inflated pro-forma statements of earnings. I have carefully reviewed the other affidavits filed on this motion, and confirm the truth and accuracy thereof, to the best of my knowledge and belief, based on my review of corporate documents since they occurred.

2. The other three affidavits submitted on this motion tell the story of the negotiations leading up to the acquisition of the Faggen Companies fully, and without more, make it clear that Harold Faggen is not entitled to summary judgment on the $5.5 million in notes which he obtained from Titan in December 1968, payment of which he seeks in this action. My affidavit hereinafter states the reasons why Mr. Faggen is also not entitled to a mandatory injunction requiring payment annually of $220,000 in interest during the pendency of this action. More importantly, we show hereinafter why Titan is entitled to summary judgment on its second cause of action to obtain basic accounting data under Faggen's exclusive control, and why Titan is entitled further to summary judgment on its first cause of action on the issue of liability for misrepresentations, with a trial remaining only on the issues surrounding Titan's remedy of rescission and/or its measure of monetary damages.

AFFIDAVIT OF ROBERT JAMES FRANKEL

*Investigation of Faggen Acquisition in 1971 and 1972*

3. I became a director of Titan in the 2nd half of 1970 and was chosen to be Chairman of the Board and Chief Executive Officer in February 1971 principally because of my large stock position in the company - 536,248 shares - and my disenchantment with existing management. My feeling at that time was that my investment in Sovereign Construction Company, Ltd., my own Division sold in September 1969 to Titan, could lose all value as a result of my exchanging my ownership for shares of Titan. The change of control in Titan which occurred herein in 1971 was joined in by several other major stockholders in a position similar to mine. We inherited a very sick corporate body, and the first few months of our effort involved getting control over financial emergencies throughout the corporation in the most expedient manner possible. The first six months of 1971 were spent in a fight for corporate survival, as contrasted with investigation of prior transactions and rationalization of the corporation's activities.

AFFIDAVIT OF ROBERT JAMES FRANKEL

4. But one of the first trouble spots I examined was that of the Faggen Companies.

In April 1971, Titan was faced with paying $110,000 interest to Faggen on the $5.5 million in notes. With approval of the Board of Directors, I authorized Mr. Faggen to pay his interest from the cash on hand in his Division. His reply was that he had no money to comply with this directive. I became quite alarmed by this fact as I was under the impression that Mr. Faggen's Division was a profit center for Titan. I immediately called for the corporate records on Mr. Faggen's operations. Thus, by the late Spring of 1971, I learned from the records that the Faggen Companies had cost the corporation $5.5 million in notes, costing $220,000 a year in interest and beginning to come due in 1974 with $1 million one hundred thousand, in annual principal payments due over five years to retire the debt. Contrasted with this cost to the corporation, I learned that the earnings for the year 1970 of the Faggen Companies was less than $200,000 pre-tax. Our year end audit for 1970 was only completed in April 1971. When presented with the problems of his operations, Mr. Faggen assured the Board of Directors that the worst was over in his companies. The actual fact was that there were prospects

of continuing losses in 1971 and 1972 which have ultimately occurred. These were the business realities that I had to contend with in the late Spring of 1971.

5. There was also a serious corporate political reality that I had to contend with. Mr. Benjamin Robinson who had introduced my Division to Titan was still on the Board of Titan and still a figure with substantial power in and historical knowledge of the corporation. Defendant Faggen was also on the Board (until May, 1972) and his close friendship with Robinson, Chairman of the Board at the time of Faggen's acquisition, continued in a manner that controlled indirectly much of the Board's activities. In 1971 the corporation was still paying substantial pensions to former Chairman Robinson, and he was until May, 1972 taking an active part in all activities of the Board of Directors. The following will show the active role of Mr. Robinson, and how the actions of Faggen prevented my investigation from going forward and delayed the bringing of this suit until May 1, 1972.

6. When I first inquired of Mr. Robinson as to who in Titan was responsible for the Faggen acquisition I received a detailed memorandum from him to the effect that "The purchase of Faggen by Titan was negotiated *exclusively*

by Ed Kaufman." Annexed hereto as Exhibit 1 is a letter of March 31, 1971 to me from Mr. Robinson stating such point. But partially corroborating the Kaufman affidavit submitted on this motion, Mr. Robinson also recalled:

> "The reasons for the purchase were the desire of Titan to buy a profitable company with growth potential * * * Faggen was instructed to plow back his actuarial profits which on an adjusted basis were about $500,000 pre-tax a year * * *" (Exhibit 1, page 1).

Mr. Robinson rounded the $571,000 in earnings actually represented by Faggen down to "about $500,000 pre-tax". The quoted letter further indicates Robinson's activities as a go-between in March 1971 as he had been in 1968, when the acquisition was made, and gives another example of how Mr. Faggen employed, once again, an affront to his dignity to conceal his conduct in 1968:

> "These facts show why Harold is shocked to hear anyone say his company was worth at the time of sale $1,500,000 and makes rational discussion difficult to say the least" (Exhibit 1, page 2).

I barely knew Mr. Faggen at that time and had no understanding of his techniques of concealment which came out later from my predecessor chairman, Ed Kaufman. My concern was to find out what had happened to Faggen's "growth potential" in 1969 and 1970.

7. On April 8, 1971 I continued my effort to get at the facts which underlay the Faggen acquisition, but even without the detailed facts, the business transaction, in light of Faggen's subsequent performance, so failed to make any corporate sense that I made it clear to Ben Robinson and Harold Faggen that I felt his subordinated convertible notes should be converted into some number of shares of common stock. These are the negotiations referred to in Faggen's recent affidavit. Annexed hereto as Exhibit 2 is a letter of April 8, 1971 from Ben Robinson with a memo attached, repeating his lack of involvement in the negotiations. The memo from attorney Michael Rosen ("M.N.R.") in his office corroborates the Kaufman affidavit in most respects, saying that the negotiations were conducted and completed by Mr. Kaufman before the Robinson firm did any legal work. At the time I received this memo, I was in a dispute with Mr. Kaufman over other corporate expenditures during his tenure and did not have

access to his files and the documents which have now become exhibits to his affidavit. These documents, as well as the memo from Ben Robinson and his associate, completely belie Mr. Faggen's current affidavit to the court to the effect that his representation of pre-tax earning power was given merely at a preliminary stage of the discussions.

8. By May of 1971, before I had obtained evidence of wrongdoing by Faggen, I thought the corporation should attempt to negotiate with Mr. Faggen for a revised deal and should not make any further interest payments to him. I so recommended this approach to the Board. Ben Robinson took a contrary view, stating:

> "There should be continuing discussions to see if there is a viable solution. Being an optimist, I hope one can be found.
>
> "At the same time, as a Director, I must express a strong opinion against permitting a default in an interest payment involving $11,000 which can trigger a $5,500,000 default. I would think the impact on the Company's credit including particularly your bonding ability and the insurance agencies relations to their carriers and the State Insurance

Departments would be horrendous. If the public trading in our stock is prohibited, it will create a blot which will not readily be removed.

"Payment of this interest payment gives you another 6 months to negotiate or to determine any other action you wish to recommend" (Exhibit 3).

In May of 1971, I was alone and my position as Chief Executive Officer was far from consolidated and the other directors who had taken control with me were fearful of refusing to pay, with the threat of an acceleration of the $5.5 million in indebtedness on the notes. I was particularly vulnerable since we had no positive evidence of fraud by Faggen at that time and were operating primarily on our business instinct that the corporation had gotten much less than it bargained for. Titan made the May, 1971 interest payment only after receiving notice on May 3, 1971 accelerating payment of the notes by Mr. Faggen, and only after agreement with Mr. Faggen that we would try to negotiate a resolution of the dispute before the next payment was due in 6 months. The acceleration was then rescinded. We did not have sufficient facts in

our possession at that time to bring a fraud suit, so we made the payment in order to provide a six-month period to negotiate with Harold Faggen in order to reach an amicable settlement that would avoid the adverse publicity of such litigation. Annexed hereto as Exhibit 4 is a letter I sent on May 18, 1971 to Ben Robinson, describing why I released the current interest payment and stating that "I hope the foregoing resolves your current anxiety".

9. Despite extensive efforts to resolve the problem, by September of 1971 I had gotten nowhere in my negotiations with either Faggen or his counsel. Other large stockholders who were also directors were told I was being too difficult in my discussions with Faggen and his attorney and that there should be appointed a committee, excluding me, to negotiate with Mr. Faggen. Annexed hereto as Exhibit 5 is a letter of September 15, 1971 to my co-directors, President George F. Duthie, and Executive Vice President Ronald Rosenfeld, instructing them to try to negotiate with Faggen, for whom Ben Robinson continued to act as intermediary. Copies of the cited letter went to Robinson and Faggen. This action by other members of the Executive Committee of the Board met with adamant refusal by Faggen and his counsel.

AFFIDAVIT OF ROBERT JAMES FRANKEL

At this time, at my insistence, the corporation engaged special counsel (other than the firm presently handling the case), to investigate the facts and advise the Board of any impropriety. Consideration was being given to joining former Chairman Robinson as a defendant, for what seemed to be his active role in the corporation's entering such a grossly improvident business deal with an admitted close friend of Robinson. The result of such plan, openly communicated to Robinson at a board meeting, was a threat of immediate countersuit against all the members of the Board. Annexed hereto as Exhibit 6 is a letter sent to me at the time by Mr. Robinson, further corroborating that his activities in the transaction were restricted to being engaged in the mechanics of closing the matter, and that under Kaufman's direction, his office "clarified minor business points with Sheib and did the drafting and preparing of papers, etcetera required to carry out the basic economic arrangements arrived at between Faggen and Titan" (Exhibit 6). Directly contrary to this exhibit is the invoice, dated January 28, 1969 from Mr. Robinson's firm to Titan in the sum of $17,500 stating:

AFFIDAVIT OF ROBERT JAMES FRANKEL

"In connection with the acquisition of Harold Faggen Associates, Inc., Actuarial Tabulating Corp., Employee Fund Service Corp., and Fund S & E Corp. for $5,500,000 in convertible debentures including the preparation of contracts, negotiations in respect thereof, preparation of closing documents and post-closing matters" (Exhibit 6A).

It was apparent Mr. Robinson was now trying to deny what he collected a considerable sum of money for while still Chairman of the Board of Titan. At this time we still did not have the material in Kaufman's files which establish the timetable of the negotiations, and documenting the handwritten representations of earning power given by Faggen to supersede the $288,000 in earnings shown in his key tax return and raise them to $571,000 in 1968. Thus the significance of Mr. Robinson's statements, which now corroborate our position on the motion for summary judgment, were taken in 1971 to be merely the attempt of a former chief corporate officer, who feared being sued, trying to escape all responsibility for negotiation of the transaction.

AFFIDAVIT OF ROBERT JAMES FRANKEL

10. On October 29, 1971, we made another interest payment to Faggen because the Board was afraid to sue him based on the facts then known and while our investigation was continuing. The payment, however, was made under protest with all rights reserved to sue "for rescission, damages, or other remedies relating to said acquisition" (See Exhibit 7 annexed). Concurrently with the investigation we were also trying to negotiate some settlement with Mr. Faggen, but of course were still fundamentally in the dark as to the sequence of documents under which the transaction had occurred.

11. Late in 1971 new special counsel was engaged, and an intensive investigation of certain documents furnished by Kaufman and other materials found in the files of the Board of Directors was undertaken. Counsel isolated the selling memorandum from the board records, showing the $571,000 in earnings for 1968, and the three preceding years, and counsel put the investigation into focus to see if the prior Board had relied on this memorandum of earning power, which showed receipt of it by both Robinson and former President Anthony Frank. This inquiry led to the demand in February, 1972 for an audit of the Faggen Companies during the years preceding the

acquisition, to see if this newly discovered representation of earning power had been true when made. The Hatcher affidavit shows how the corporation has since been thwarted at every step in making such audit and in obtaining the work papers and memoranda of Joseph Warren & Co. prepared in 1968 and previously for the years in question. The Hatcher affidavit and Exhibits B, C and D thereto document the contumacious refusal of defendant Faggen and his counsel to allow this corporation to inspect ledgers and accounting data, which it already owned, or which indirectly were its property, because Joseph Warren & Co. had been on its payroll since the acquisition. The corporation owned both the prior and subsequent accounting work of Joseph Warren & Co. done on behalf of the Faggen Companies.

Counsel informs me that apart from any question of ownership of all these documents by the corporation, notwithstanding their being wrongfully retained by Faggen, we are plainly entitled to see all this accounting material under the broad discovery provisions of the Federal Rules of Civil Procedure, operative in a Rule 10b-5 case. Our request for cooperation, followed by refusal, and then reluctant and half-hearted compliance documented

in the correspondence annexed to the Hatcher affidavit, show the game that Mr. Faggen was playing from January to May of 1972. By then, he knew we were on to the basic technique he had used to induce the transaction and obtain the $5.5 million in Titan notes - the grossly exaggerated representation of earning power constituting Exhibit 1 to the Complaint. At all costs Faggen was trying to keep us from getting at the hard accounting data which would demonstrate that he had grossly exaggerated the earning power of his companies.

12. As Chief Executive Officer of Titan I experienced problems in the Board during April of 1972 in authorizing the bringing of this lawsuit. When we had a board meeting to discuss the document sued upon, with special counsel Powers present, director Ben Robinson again emphasized the risk to the corporation of suing and having the $5.5 million in notes accelerated for payment. At that meeting, however, he admitted receiving a copy of Exhibit 1 to the Complaint, and that his own handwriting showing receipt was on the front right hand copy of the document; he made such admission before the whole Board. Presumably to help the corporation, Mr. Robinson, as expected, promptly went to hospitalized

director Faggen, laid out the basis for our case, and obtained further "explanations" from Faggen (which are shown as Exhibit 1 to the Anthony Frank affidavit) under date April 10, 1972. It was only the happenstance of Faggen's illness which finally enabled us to unilaterally obtain possession of the ledgers at his premises, which led to the preliminary audit in April, 1972, showing the gross exaggeration of earning power detailed in the Hatcher affidavit and exhibits. This long overdue accounting work was effectively prevented by Faggen for years before, by using his political power on the Board, by becoming indignant, or by refusing to even talk to home office executives. The recent audit provided the final set of facts which led to a unanimous conolusion in the Board (except for director Robinson) that refusing to make further payments on the notes and instituting suit was a duty of present management to themselves and to the thousands of other stockholders of the corporation. In sum, suit was not brought until we had hard facts that convinced us that Titan had been defrauded.

To this day we have still not obtained the Warren work papers and summaries prepared in 1968 and we are obviously entitled to them under the Federal Rules of

Civil Procedure, as well as by implication from our presumed ownership of the Faggen Companies and all their books and records. We cannot adequately prove our full case on damages without having all the material necessary to make a complete and final audit, and are seeking an order of mandamus requiring Faggen and persons under his control, including Joseph Warren & Co., to promptly make this material available to us in preparation for trial on the issue of damages. In substance, we are seeking summary judgment for the reasons stated above on the second cause of action to compel disclosure of these accounting materials as a necessary prerequisite of our fully proving our monetary claims under the first cause of action. We are incapable of trying the corporation's case effectively without all this accounting material available for analysis and reconstruction, and will undoubtedly need to take oral testimony from both Faggen and Joseph Warren & Co. to reconstruct and audit their financial statements on an accrual and cash basis for the years 1965 through 1968.

AFFIDAVIT OF ROBERT JAMES FRANKEL

*Right to Summary Judgment on the Issue of Liability*

13. While the corporation concededly cannot prove the magnitude of its damages without completing an audit using the above described documents, our right to summary judgment on the grounds that defendant Faggen violated Rule 10b-5, as well as the laws of New York, in presenting grossly exaggerated statements of earning power, which were relied upon by Titan's management, would seem fully established by the Kaufman, Frank and Hatcher affidavits submitted herewith. A sequence of documented representations of earning power, on fixed dates, leading directly to approval by the Board of Directors of Titan on October 9, 1968 is set forth in these papers. Mr. Faggen's moving affidavit submits only one palpably false assertion on the subject, to wit, that his handwritten selling memorandum was furnished only at a "preliminary" step in the discussions, together with some vague, unitemized adjustments which he now says he had in mind, but never communicated to Titan. It would seem that there are no genuine issues of material fact as to a violation of Rule 10b-5, and reliance by management of Titan

on the false statements made and the scheme to defraud with pro-forma earnings statements implicit therein.

14. The final magnitude of the falsity is not entirely closed, of course, because the amount and percentage of overstatements of earnings for each year may be even larger than are set forth in the Hatcher affidavit. The final amount of the overstatements will only be known when we have the Warren work papers and other materials and testimony with which to complete a full audit. But taking Faggen's moving affidavit, and measuring it against his written representations of earning power with his specific adjustments for one year (many of which are quite different from those in his moving affidavit), misrepresentations would seem to be fully and finally established by the documentary evidence herein. So long as the falsity is material, the precise magnitude thereof can await a trial on the issue of damages, when actual value of the Faggen Companies becomes relevant.

15. A trial on the issue of the proper measure of relief is anticipated in any event because of Faggen's contention in his pleadings that the remedy of rescission of the transaction is inappropriate, and the conflict anticipated on the proper measure of monetary damages,

if granted in aid of a decree of rescission, or if damages are the only remedy granted herein. But summary judgment as to liability is called for by the undisputed facts.

*Faggen Comes into Equity With Unclean Hands*

16. Mr. Faggen seeks *pendente lite* relief in equity for payment of $220,000 per year to him in interest payments on the notes he is holding. The Hatcher affidavit shows that at this point Titan is holding no more than approximately $900,000 in hard value from the Faggen acquisition as against exposure to $2,500,000 in claims by alleged holders in due course of the Titan notes, which Faggen has since transferred. The balance of hardships at this point is very much against Titan, with its only remedy to recover against Faggen whatever amounts ultimately have to be paid on these notes which he transferred. The documented misrepresentations he gave the Company would indicate little likelihood of ultimate recovery on the $5.5 million in notes by Faggen, which is another ground for denying him injunctive relief at this point.

17. But apart from the substantial net loss to Titan on the transaction, Faggen has currently undertaken a

course of conduct which would undoubtedly deprive Titan of any benefits from its acquisition of the Faggen Companies, and which is inequitable in the extreme. Faggen's employment contract expired at the end of 1971, and he continued on a month to month basis, with a two-year covenant "not-to-compete" in operation until December, 1973. (The employment contract is annexed as Exhibit 8; covenant not-to-complete is on page 2.) He was working for the Faggen Companies until this lawsuit was brought in May of 1972. He then made certain demands to which we would not accede, negotiating with us on continuing consulting arrangements at the magnitude of $50,000 annually to him and $63,000 paid to his wife, Rose Dogan, and we would not agree on continuing to pay him such substantial amounts on a business which had dwindled appreciably, experienced a major loss in 1971, and which had a very dim future. Annexed hereto as Exhibit 9 is a letter to me from Harold Faggen dated May 24, 1971, addressed to all the members of the Board of Titan. This letter was followed by meetings in which other executives of the Faggen Companies were put in managerial control, and Mr. & Mrs. Faggen were invited to serve as consultants. A copy of such letter inviting them to serve as

consultants, dated June 6, 1972, is annexed as Exhibit 10. Concurrently with these meetings, Mr. Faggen had moved for summary judgment in this court and for an order requiring that interest payments be made to him. Our desire to preserve the clients of this personal service business to the fullest extent possible is related to another letter sent on June 21, 1972 to Mr. and Mrs. Faggen (Exhibit 11). We were trying to mitigate our own damages, and presumably Mr. Faggen's, regardless of the ultimate outcome of this action.

18. But on June 13, 1972 counsel for Mr. Faggen felt that our response to his financial requests under the proposed consulting arrangements were not adequate, and refused any future meetings. Mr. Faggen then proceeded to contact all the clients of the firm to state that Mr. & Mrs. Faggen had been discharged and discuss his future plans with them. Faggen has since told us another employee of the Faggen Companies first told this to the clients, who then contacted Faggen and obtained his views on the subject of future business relations. Attached hereto as Exhibit 12 are copies of a series of telegrams which I received from key clients stating that if Mr. and Mrs. Faggen "are no longer employed or associated with Harold Faggen Associates * * * then our 3

funds could be forced to look elsewhere for the type of service we have been receiving from Mr. Faggen and Miss Dogan" (Exhibit 12). The similarity of each telegram bespeaks careful coaching of each of his clients by Mr. Faggen. I made personal telephone calls to each of these clients of the Faggen Companies and found it virtually impossible to smooth things over. The group of customers involved represents in excess of $600,000 in annual revenues to the Faggen Companies, is the bulk of their actuarial income and is therefore the heart of the business. The other activities of the Faggen Companies have been most unprofitable in recent years and the loss of these clients will mean that Titan has no operating business in exchange for its $5.5 million in notes.

19. In order to preserve this cash flow, I have been in constant negotiation with Mr. and Mrs. Faggen and their counsel over the past two months to work out some interim consulting arrangement between them. In addition to demands for money payments, such as accrued vacation pay, accrued pension benefits and other items adding up to close to $150,000 just for the past year, they have constantly reminded me that Mr. Faggen's restrictive covenant in his employment agreement is no

longer in operation because of Titan's suing him for fraud on the notes. Mr. Faggen's position is that while he was concededly obligated under his employment agreement (attached as Exhibit 8)* not to make contact with the clients of the firm or otherwise compete through December, 1973, he is no longer bound by such restrictive covenant in his employment agreement because the employment agreement was part of the closing of his acquisition and Titan refuses to pay for the acquisition. See Exhibit 13, detailing recent negotiations on the consulting arrangement, where Faggen's counsel repeats "his claim that he is no longer bound by the restrictive covenants contained in his employment contract" (Exhibit 13, paragraph 5).

At each step in these negotiations, Mrs. Faggen, who uses her maiden name, Rose Dogan, has reiterated that she is not bound by Mr. Faggen's restrictive covenant in

---

*"Employee agrees that he will not * * *, except as an employee of Employer * * * engage directly or indirectly as a * * * employee, consultant, agent or otherwise in any business providing actuarial and computer services which is competitive to the business of Employer * * *" (Exhibit 8, page 2).

any event (notwithstanding the restriction on competing "directly or indirectly") and that she is free to contact the clients of the firm and start her own consulting business whenever she wishes. Therefore, argues Mrs. Faggen, Titan should be happy to pay the sums she requests ($63,000 annual salary, $36,000 accrued vacation pay for 1971 and other items) in order to hold on to the clients she says she is free to take.

20. In sum, Mr. and Mrs. Faggen have announced their intention to embark on the same illegal solicitation of clients as resulted in the $262,000 settlement in 1969 with Levin-Townsend Computer Service Corporation, described in Exhibit G to the Hatcher affidavit. Employees of the Faggen Companies have already done this same soliciting once, when they were not bound by any employment contract or covenant not-to-compete, but they were forced to pay $262,000 to the Faggen Companies for their wrongful actions in 1969. Mr. Faggen nevertheless feels that he is free to do the same, notwithstanding the clear provision of his employment agreement quoted above.

21. Mr. Faggen thus believes that he can, with one hand, take away virtually all the clients of his personal

service business, handle them "directly or indirectly" through his wife Rose Dogan, and with the other hand, come to the federal court and seek to enforce his $5.5 million in notes in payment for the business, and obtain a mandatory injunction requiring payment of interest at $220,000 per year to him while the litigation is pending. This is legerdemain which even exceeds that in his 1968 representations of earning power. Mr. Faggen further feels that he can eviscerate the business, receive $220,000 per year interest income, and also refuse to supply the accounting work papers of Joseph Warren & Co. and therefore prevent the plaintiff from even proving its case against him. I respectfully submit that Mr. Faggen's conceptions of equity are somewhat different from those normally enforced by the federal courts.

*Conclusion*

22. We have brought this action to protect our corporation and its thousands of public stockholders, against the difficulty of reconstructing negotiations in a transaction that occurred three years before, where each executive was doing his best to seem blameless for what appeared to be a ridiculous price for apparent value

received and against the opposition of defendant Faggen who contumaciously withholds the accounting data necessary to prove our case, while he lays plans to take away all the clients of the Faggen Companies for himself and his wife. Based on all the facts submitted, Mr. Faggen is not entitled to summary judgment, Mr. Faggen is not entitled to interest *pendente lite*, and Titan is entitled to have the Joseph Warren records and work sheets and to have summary judgment on the issue of liability for fraudulent misrepresentations, with trial on the remedy of rescission and/or damages to be duly held thereafter.

WHEREFORE, I respectfully pray for the foregoing relief on behalf of Titan.

(Sworn to by Robert James Frankel, September 11, 1972.)

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

ROBINSON, SILVERMAN, PEARCE, ARONSOHN & SAND
230 PARK AVENUE
NEW YORK, N. Y. 10017
(212) MU 9-7766
CABLE: "ROSILPE"

WASHINGTON OFFICE
888 19TH STREET, N. W.
WASHINGTON, D. C. 20006
(202) 296-7272
"MEMBER WASHINGTON, D.C. BAR ONLY

BENJAMIN M. ROBINSON
MATTHEW SILVERMAN
SAUL PEARCE
ALAN J. S. ARONSOHN
LEONARD D. SAND
LAURENCE A. SPELMAN
STANLEY BERMAN
EDWIN G. CALLAHAN*
LEWIS M. BAXTER
EDWARD D. SCHOCH
JAMES F. GILL
JORDON J. FINDAR
MICHAEL M. ROSEN
ARTHUR W. BAILL
ALAN D. PEARCE
BARRY I. FREDERICKS
CHARLES H. ROTICK
MICHAEL P. OSHATZ
ROBERT L. TRACY

March 31, 1971

Mr. Robert James Frankel
Sovereign Construction Co.
1325 Inwood Terrace
Fort Lee, New Jersey 07024

Re: Faggen

Dear Bob:

Just to put the record straight, I believe these facts should be clear.

I. The purchase of Faggen by Titan was negotiated exclusively by Ed Kaufman. No-one in this office participated.

The proposed agreement was drafted by Kaufman's office in Los Angeles.

II. The reasons for the purchase were the desire of Titan to buy a profitable company with growth potential, to buy an affiliate to assist the insurance division and to build a data processing division. To this end Faggen was instructed to plow back his actuarial profits which on an adjusted basis were about $500,000 pre-tax a year, to build the new division. In the last quarter of 1968 (the first three months after the purchase date and before the expansion) Faggen earned $102,000 after at least $17,000 of new adjustments.

Faggen employed normally about 33 persons. After the expansion he is employing 65.

It was agreed by Kaufman, Spence and Weinstein that a break-even through 1970 would be satisfactory. Nevertheless in 1970 Faggen earned $205,000 pre-tax.

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL



The West Coast interviewed Phil Belinsky (employed by Litton) to head the new division and then approved his hiring by Faggen.

III. On December 31, 1969 Faggen Assoc. and affiliates had

| | | |
|---|---|---|
| Cash | $ 246,000 | |
| Securities | 1,368,000 | (at market) |
| Accounts Receivable | 372,000 | |
| Miscellaneous | 22,000 | |
| Titan Debt | 25,000 | |
| | $ 2,033,000 | |

with a net worth of $2,011,046.

In 1969 and 1970 Faggen delivered to Titan an aggregate of $2,119,417 (including the $25,000 Titan debt).

These facts show why Harold is shocked to hear anyone say his company was worth at the time of sale $1,500,000 and makes rational discussion difficult to say the least.

IV. He estimates pre-tax profit in 1971 of about $400,000 after further considerable expense in still building the data processing end of the business. All in all,1971 data processing costs will still exceed its income because of the nature of the business in building programs, etcetera.

Despite all this, I am urging him to consider the entire subject as presented by you to see if there is any possibility of accomplishing corporate desires. He is doing so.

I repeat --- we should know the facts whatever our desires may be.

Sincerely,

Benjamin M. Robinson

c.c. Messrs. George Duthie
Ronald Rosenfeld
Harold Faggen

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

MEMORANDUM

April 8, 1971

To Benjamin M. Robinson
From Michael N. Rosen
Re Titan Group, Inc.
/Harold Faggen Associates, Inc.

---

You asked me to review our files and give you my recollection of our firm's role in the negotiations leading up to the acquisition by Titan Group, Inc. of Harold Faggen Associates, Inc. and certain affiliated corporations.

My recollection is, and our files bear this out, that we did not participate in any significant way in the negotiations pertaining to the business aspects of this transaction. The negotiations were conducted by Edmund M. Kaufman, of Irell & Manella, and the first draft of the papers, which embodied the economics of the transaction, was prepared by his office. Our firm's role, in consultation with Ed Kaufman, was to conduct discussions with Simon Sheib who represented the acquired companies, to make the necessary revisions in the papers, and to close the transaction.

As indicated in the attached correspondence, we kept Ed Kaufman informed and sought his approval of revisions in the drafts of the documents as discussions with Simon Sheib progressed. In addition, we telephoned him frequently to solicit his views and recommendations.

If you require more specific or additional information, I will be happy to furnish it to you.

M. N. R.

f

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

ROBINSON, SILVERMAN, PEARCE, ARONSOHN & SAND
230 PARK AVENUE
NEW YORK, N. Y. 10017
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MATTHEW SILVERMAN
PAUL PEARCE
ALAN J. B. ARONSOHN
LEONARD B. SAND
LAWRENCE A. SPELMAN
STANLEY BERMAN
EDWIN G. CALLAHAN
LEWIS R. BAXTER
EDWARD B. BENDEN
JAMES P. GILL
JORDON J. FINGAR
MICHAEL H. ROSEN
ARTHUR M. GOLL
ALAN S. PEARCE
BARRY L. FREDERICKS
CHARLES M. NOTICK
MICHAEL P. CONAIT
ROBERT L. TRACY

WASHINGTON OFFICE
888 16TH STREET, N. W.
WASHINGTON, D. C. 20006
(202) 296-7870
MEMBER WASHINGTON, D.C. BAR ONLY

May 14, 1971

55

Mr. Robert James Frankel
Sovereign Construction Company
1325 Inwood Terrace
Fort Lee, New Jersey

Dear Bob:

I have given much thought to the Faggen matter.

I understand your problems and desires, and I also understand at least some of Harold's problems.

There should be continuing discussions to see if there is a viable solution. Being an optimist, I hope one can be found.

At the same time, as a Director I must express a strong opinion against permitting a default in an interest payment involving $110,000 which can trigger a $5,500,000 default. I would think the impact on the Company's credit including particularly your bonding ability and the insurance agencies relations to their carriers and the State Insurance Departments would be horrendous. If the public trading in our stock is prohibited, it will create a blot which will not readily be removed.

Payment of this interest payment gives you another 6 months to negotiate or to determine any other action you wish to recommend.

Sincerely,

Benjamin M. Robinson

BMR:ep
cc: Mr. George Duthie, President
Mr. Alvin Kendis, Esq.,
General Counsel and Director

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

May 18, 1971

Robinson, Silverman, Pearce,
Aronsohn & Sand,
230 Park Avenue,
New York, NY 10017

Attention: Benjamin M. Robinson Esq.

Re: Harold Faggen Associates, Inc.
Our File RJF #185-55a

Dear Ben:

In reply to your letter of May 14, 1971, please be advised that I have communicated with Simon Sheib, attorney for Harold Faggen, on both Sunday May 16 and Monday May 17, 1971 and it was agreed that TGI would release the current interest payment of $110,000.00 in accordance with the disputed agreement with Harold Faggen in order to provide a six month period in which to negotiate with Harold.

I hope the foregoing resolves your current anxiety.

Sincerely,

TITAN GROUP, INC.

Robert James Frankel

Chairman of the Board and
Chief Executive Officer

RJF:as

cc: George Duthie
Dan Hatcher
Alvin M. Kendis

EXHIBIT 5, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

September 15, 1971

Titan Group, Inc.
222 Executive Park
Louisville, Kentucky 40207

Attention: Mr. George F. Duthie

Multiplex, Inc.
2121 S. Green Road
Cleveland, Ohio 44121

Attention: Mr. Ronald Rosenfeld

Re: Harold Faggen Esq.
Our File RJF #185-55A

Gentlemen:

In accordance with the discussion held at the Board of Directors Meeting of September 14, 1971, it is my understanding that you will meet with Messr's Harold Faggen and Ben Robinson immediately for the purpose of structuring a cancellation of the $5,500,000.00 convertible debenture as a means of resolving the outstanding dispute between TGI present management and Mr. Harold Faggen.

It must be clearly understood that any such action on your part must be reviewed by the Executive Committee and the Board of Directors and that there is no authority to conclude an agreement until formal action of these Boards.

You are further advised, in accordance with the determination of the Executive Committee, that unless immediate resolution of these problems is effected and a position of compromise reached prior to the due date of the next interest payment on the debentures, that we have received advice from counsel, in writing, that a formal proceeding could be instituted against Mr. Harold Faggen, et. al.

While, as Chief Executive Officer, I am particularly anxious to avoid litigating this issue, the refusal of Mr. Harold Faggen to negotiate a compromise may leave us no alternative.

Your prompt advice as to the action taken in this matter will be required.

Sincerely yours,

TITAN GROUP, INC.

By: Robert James Frankel
Chairman of the Board and
Chief Executive Officer

RJF:as
cc: Alvin M. Kendis, Benjamin M. Robinson, Harold Faggen, Daniel G. Hatcher

EXHIBIT 6, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

ROBINSON, SILVERMAN, PEARCE, ARONSOHN, SAND & BERMAN
230 PARK AVENUE
NEW YORK, N. Y. 10017
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CABLE: "ROSILPE"

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MATTHEW SILVERMAN
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ALAN J. B. ARONSOHN
LEONARD B. SAND
LAURENCE A. SHELMAN
STANLEY BERMAN
EDWIN G. CALLAHAN*
LEWIS R. BASTER
EDWARD D. SCHOEN
JAMES F. GILL
JORDON J. FINGAR
MICHAEL N. ROSEN
CHARLES M. KOTICK
ARTHUR W. BRILL
ALAN S. PEARCE
MICHAEL P. OSHATZ
ROBERT L. TRACY
DAVID A. WALLACE
EDWARD SUSSMAN
STEVEN M. GOLDMAN

WASHINGTON OFFICE
888 16TH STREET, N. W.
WASHINGTON, D. C. 20006
(202) 298-7272
*MEMBER WASHINGTON, D.C. BAR ONLY

September 20, 1971

Mr. Robert James Frankel
Titan Group, Inc.
1325 Inwood Terrace
Fort Lee, New Jersey 07024

Re: Faggen

Dear Bob:

I have a copy of your letter of September 15th addressed to George Duthie and Ronald Rosenfeld, and the letter to me dated September 20th.

Your understanding expressed in the first paragraph of the letter of September 15th is wrong. No one as a result of the Board meeting or the discussions which followed can have any plans to meet with me for any purpose relating to Harold Faggen. After the Board meeting adjourned, an informal discussion took place primarily between you and Harold. It is my understanding that this was followed by talks between Harold, Ronnie and George concerning their getting together this week to review the situation. I was not involved in the discussions or in any plans to meet.

I see no point in extended letter writing to dispute many of your statements or interpretations. Obviously we differ. Let me use one statement as an example. You say Rosen's statement that part of our role was "to close the transaction" would indicate a final "veto" power. This is not the fact. This office did not make the deal; it

EXHIBIT 6, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL



could not veto the deal. Decisions were made on the West Coast while we were engaged in the mechanics of closing the matter and, under Kaufman's directions, clarified minor business points with Sheib and did the drafting and preparing of papers, etcetera required to carry out the basic economic arrangements arrived at between Faggen and Titan. This was of course the convenient thing to do in view of the fact that Kaufman was so far away. Other deals for Titan were handled in the same way.

Further, you refer to your letters of April 6, 1971, May 14, 1971 and May 18, 1971, to which you say I failed to respond. Your letter of May 18th told me you were paying the current interest. Certainly you didn't want an answer from me. Your letters of May 14th and April 6th questioned certain figures. May I remind you that in a conversation, I suggested that the correct figures could easily be determined by your accountants, that I did not have the books. Basically the difference is represented by your using "cost" instead of "market" figures for the securities and the inclusion of an income tax reserve of over $300,000 which Titan accountants wanted for some reason. I understand this was subsequently reversed and not paid. In respect to the marketable securities, of course a seller who delivers securities worth about a $1,300,000 in the market at the time of the transaction will use this figure and not his cost. With these adjustments, the net worth was over $2,000,000.

Finally, referring to your paragraph "4", please be advised I do not make "threats". I made this statement as a statement of fact. Each Director can make his decision based on his view of all the facts. I would expect the minutes of the meeting to contain my remarks in proper context as well as yours. If the minutes do not contain

EXHIBIT 6, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL



your statement that the proposed suit against me is "for the purpose of forcing negotiations with some one who won't negotiate", they will not accurately reflect what took place.

Sincerely,

Ben

Benjamin M. Robinson

EXHIBIT 6A, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

ROBINSON, SILVERMAN, PEARCE, ARONSOHN & SAND
230 PARK AVENUE
NEW YORK, N.Y. 10017

AREA CODE 212
MURRAY HILL 8-7700
CABLE: "ROSILPS"

January 28, 1969

Titan Group, Inc.
529 Fifth Avenue
New York, N. Y.

OFESSIONAL SERVICES RENDERED

| | |
|---|---|
| Materials or service rec'd | |
| Prices OK | OK to pay |
| Footing, extn OK | Disc OK |
| Charge a/c | Vo # 12-76 |
| a/c OK | Amt Vo'd $ 7272.04 |
| Amt Paid | Check # |
| Date paid | |

In connection with the acquisition of Harold Faggen Associates, Inc., Actuarial Tabulating Corp., Employee Fund Service Corp., and Fund S & E Corp. for $5,500,000 in convertible debentures including the preparation of contracts, negotiations in respect thereof, preparation of closing documents and post-closing matters.

16A

19-E

Fee $17,500.00

Disbursements to Follow

Faggen 2 mo

| | |
|---|---|
| Xerox | $ 305.20 |
| Stenographic Overtime | 407.83 |
| Toll Calls; Messenger Service, Misc. | 269.06 |
| Total | $ 982.09 |

19-8

High Point

| | |
|---|---|
| Xerox | $ 76.50 |
| Stenographic Overtime | 69.18 |
| Toll Calls, Misc. | 23.45 |
| Prentice Hall | 243.45 |
| Travel | 192.75 |

EXHIBIT 7, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

October 29, 1971

Mr. Harold Foggen
c/o Harold Foggen Associates, Inc.
853 Broadway
New York, New York 10003

Dear Mr. Foggen:

We enclose herewith TITAN check No. 3147 dated November 1, 1971 in the amount of $106,700 in payment of semi-annual interest on debentures held by you and which were issued in connection with the acquisition of your corporations by TITAN GROUP, INC.

Checks in appropriate amounts aggregating $3,300 have been issued and simultaneously mailed to the individuals named in your letter to me dated April 29, 1971, being persons to whom transfers of debentures have been made by you.

The payment of interest by all checks totals $110,000.

As you are aware, since the date of the last payment of interest on May 17, 1971, an independent investigation of the circumstances surrounding the acquisition of your companies has been initiated and TITAN GROUP, INC. expressly reserves all rights which it may have for recision, damages, or other remedies relating to said acquisition. The within payment of interest does not constitute a waiver of such rights.

Yours very truly,

TITAN GROUP, INC.

D. G. Hatcher, Jr.

DGH/nnr
Enclosure

CERTIFIED MAIL R.R.R. #966836

AIR MAIL SPECIAL DELIVERY

BCCS:
Robert James Frankel
Alvin M. Kendis

EXHIBIT 8, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

AGREEMENT made this 2nd day of December 1968, by and between TITAN GROUP, INC. ("Employer"), having its principal office at 529 Fifth Avenue, New York, New York, and HAROLD FAGGEN ("Employee"), residing at 11 Fifth Avenue, New York, New York.

WITNESSETH

1. *Employment.* Employer hereby employs Employee and Employee hereby accepts employment upon the terms and conditions hereinafter set forth.

2. *Term.* Employee's employment shall commence on the 2nd day of December, 1968, and shall terminate on the 1st day of December, 1971.

3. *Duties.* Employee shall perform such executive duties concerning the business of providing actuarial and computer services and related activities as shall be designated by the Board of Directors of Employer. If Employee is elected a director or an officer of Employer, or any of its subsidiaries, he shall serve without additional compensation therefor. Employee shall render such services for Employer or for any subsidiaries of Employer.

EXHIBIT 8, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL

4. *Compensation.* For all services rendered by Employee and all covenants undertaken by him pursuant to this Agreement, Employer shall pay and Employee shall accept compensation at the rate of Fifty Thousand Dollars ($50,000) per annum, payable in equal semi-monthly installments.

5. *Restrictive Covenants.* (a) Employee shall devote his full time, attention and energies to the business of the Employer, and shall not during the term of his employment be engaged in any other activity which will interfere with the performance of his duties hereunder.

(b) Employee agrees that he will not, for a period of five (5) years from the date hereof, except as an employee of Employer or an affiliate or subsidiary thereof, engage directly or indirectly as a shareholder, officer, director, partner, employee, consultant, agent or otherwise in any business providing actuarial and computer services which is competitive to the business of Employer, its affiliates or subsidiaries.

EXHIBIT 8, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL

Nothing contained in the foregoing shall prevent the Employee from purchasing securities of any corporation whose securities are regularly traded on any national securities exchange or in the over-the-counter market, providing that such purchases shall not result in his and his associates collectively owning, directly or beneficially, at any time, ten percent (10%) or more of the voting securities of any corporation engaged in any business competitive to that then carried on by the Employer or any subsidiary or affiliate thereof.

(c) During the term of his employment and at any time thereafter, Employee shall not disclose to any person, firm or corporation any confidential information or trade secrets relating to the business of the Employer or any subsidiary, affiliate or division thereof.

For the purposes of this Agreement, the term "subsidiary" shall include any subsidiary of a subsidiary of the Employer or a division thereof.

6. *Consent to Injunction.* Employee agrees that the restrictions contained in Paragraph "5 (a)", "5 (b)" and "5 (c)" of this Agreement are necessary

for the protection of Employer and any breach thereof will cause Employer irreparable damage for which there is no adequate remedy at law and Employee consents to the issuance of any injunction in favor of Employer enjoining the breach of the aforesaid covenants by any court of competent jurisdiction.

7. *Non-Waiver of Any Other Remedies.* Employee agrees that the rights of Employer to obtain an injunction granted by Paragraph "6" of this Agreement shall not be considered a waiver of Employer's rights to assert any other remedy it may have at law or in equity.

8. *Disability.* If Employee fails because of illness or other incapacity for a period of one year to render services as shown in this Agreement, the Board of Directors may determine that Employee has become disabled and in the event of such a determination of disability, Employer may, at its option, either terminate this Agreement or, in the alternative, retain Employee in its employ for the balance of the term of this Agreement, provided, however, that in the latter event, the salary to which

EXHIBIT 8, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL

Employee shall be entitled pursuant to Paragraph "4" hereof during the continuance of said disability may be reduced to any extent determined by the Board of Directors.

9. *Law Governing Agreement.* This Agreement shall be construed, interpreted and governed by the laws of the State of New York applicable to agreements made and performed therein.

10. *Succession.* This Agreement shall extend to and be binding upon Employee, his legal representatives, heirs and distributees and upon Employer, its successors and assigns.

11. *Prior Agreements.* Any and all prior agreements between Employer and Employee, whether written or oral, relating to Employee's employment by Employer and hereby canceled and are of no further effect.

12. *Entire Agreement.* This Agreement contains the entire agreement of the parties with respect to its subject matter and no waiver, modification or change of any of its provisions shall be valid unless in writing and signed by the parties against whom such claimed waiver, modification or change is sought to be enforced.

EXHIBIT 8, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL

13. *Waiver of Breach.* The waiver of any breach of any term or condition of this Agreement shall not be deemed to constitute a waiver of any other term or condition of this Agreement.

14. *Notices.* All notices pursuant to this Agreement shall be in writing and shall be given by registered or certified mail, return receipt requested, addressed to the parties hereto at the addresses set forth above, or to such other address as may hereafter be specified by notice in writing in the same manner by any party or parties.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

TITAN GROUP, INC.

By ANTHONY M. FRANK
President

HAROLD FAGGEN

EXHIBIT 9, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

883 BROADWAY
NEW YORK, N. Y. 10003
477-5106

Certified Mail
Return Receipt Requested

May 24, 1972

Mr. Robert J. Frankel
Chairman of the Board and
Chief Executive Officer
Titan Group, Inc.
1325 Inwood Terrace
Fort Lee, New Jersey 07024

Dear Mr. Frankel:

Your recent policies directed toward the Faggen Companies coupled with the institution of the law suit against me have created difficult personnel and management problems and have served to unsettle our client relationships, who rely upon continuity and reliability of service.

Unless immediate steps are taken to allay the fear of insecurity of both personnel and clients, irreparable damage will be done to these Companies, the responsibility for which will be yours.

Yours very truly,

Harold Faggen

HF:jr
cc: Mr. George F. Duthie
Mr. Jack L. Farley
Mr. Aron Drost
Mr. Ronald Rosenfeld
Mr. Herzl B. Mendelsohn
Benjamin M. Robinson, Esq.
Alvin M. Kendis, Esq.
Mr. Patrick King
Mr. Laurence D. Skaller
Burton S. Cooper, Esq.

OPEIU 153, AFL-CIO

EXHIBIT 10, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

TITAN GROUP, INC.

ROBERT JAMES FRANKEL
CHAIRMAN OF THE BOARD
CHIEF EXECUTIVE OFFICER

June 6, 1972

Harold Faggen Associates, Inc.
853 Broadway
New York, New York 10003

Attention: Mr. Harold Faggen &
Mrs. Rose Dogan

Re: Conference of June 5, 1972
Our File RJF #185-201-1

Gentlemen:

As a result of the joint conference held at your office on Monday, June 5, 1972, it has been determined by the Executive Committee of Titan Group, Inc. that the services of Mr. Harold Faggen and Mrs. Rose Dogan as active participants in the operation of Harold Faggen Associates, Inc., and affiliated companies, will cease 60 days from and after June 5, 1972.

Management of these companies from and after June 5, 1972 will be in an Executive Committee consisting of the following persons:

Robert James Frankel
Daniel G. Hatcher, Jr.
George Stewart
Theodore Ferrara
Basil Castrovinci
Arnold Perlmutter

During the interim period, it is agreed that there will be no public announcement of this change in management.

In accordance with our discussion, it is anticipated that you will submit to the undersigned a proposal indicating the terms upon which you would be prepared to serve as a Consultant to this operation, setting forth the period of time and the dollar compensation which you consider reasonable under the circumstances. Your association as a Consultant will permit a transition of your activities to the newly apointed Executive Committee without diminishing the services being rendered to the clients now under your sole jurisdiction.

EXHIBIT 10, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL



In order to further review the matters discussed above, it is proposed that a conference be held at your office on Wednesday, June 14, 1972, at 9:30 AM.

Kindly indicate as soon as possible any questions you may have concerning the date of this meeting or the attendance of any personnel referred to above.

Naturally, all of these efforts on your part and our part to minimize the current operating difficulties of the Faggen Companies are without prejudice to our respective rights and our respective claims being made in the pending action in the Federal Court.

Sincerely yours,

TITAN GROUP, INC.

By: Robert James Frankel

Chairman of the Board and
Chief Executive Officer

RJF:emc

cc: Mr. Theodore Ferrara
Mr. Basil Castrovinci
Mr. Arnold Perlmutter
Mr. Philip Belinsky
Mr. Joseph Levine
Mr. George Sinks
Mr. George Stewart
Mr. George F. Duthie
Mr. Daniel G. Hatcher, Jr.
Lawrence M. Powers, Esq.
Mr. Ronald Rosenfeld

EXHIBIT 11, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

June 12th, 1972

Hand Deliver

Harold Faggen Associates, Inc.
853 Broadway
New York, N.Y. 10003

Attention: Mr. Harold Faggen &
Miss Rose Dogan

Re: Conference of June 5, 1972
Our File RJF #185-201-1

Gentlemen:

In reply to the letter dated June 7th, 1972 from Mr. Edward Labaton, your Counsel, and to further clarify my letter of June 6th, 1972, please be advised as follows:

1. The re-organization of the management of the Harold Faggen Companies should proceed in an orderly fashion with the minimum discomfort to all parties during the sixty day period from and after June 5th, 1972 and thereafter.

2. During this interim period, it is anticipated that the responsibilities formerly held by Mr. Faggen and Miss Dogan in the Companies will be transferred to the Executive Committee listed in the letter of June 6th, 1972.

3. During this interim period, it will be expected also that Mr. Faggen will introduce to the clients formerly under his sole jurisdiction, the representatives of the Executive Committee who will then proceed to service those clients on behalf of the Faggen Companies. The purpose of retaining Mr. Faggen as a consultant for a limited period of time after the sixty days is to make sure that Mr. Faggen's status in the industry is not diminished by any activity of the Faggen Companies or by any member of the restructured management. His participation as a consultant should permit an orderly transition of these activities. Much depends on Mr.

EXHIBIT 11, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL



Faggen's willingness to participate in this goal.

4. Similarly the activities of Miss Dogan should be turned over to the members of the Executive Committee as quickly as possible and with a minimum of interruption of service.

The agenda for the meeting to be held on June 14th, 1972 is:

1. To review the steps necessary to accomplish the foregoing, and

2. To make specific assignments of Executive Committee personnel to the functions necessary for the continuance of the Faggen Companies as an operating group.

3. In addition, short range and long range planning will be attempted for the purpose of establishing budget requirements for these divisions and for controlling cash.

4. Reporting requirements of TGI for this division will be reviewed by Mr. Hatcher, our Financial Vice President.

If there is further question concerning the above, please communicate with the undersigned promptly.

Very truly yours,

TITAN GROUP, INC.

By: Robert James Frankel

Chairman of the Board and
Chief Executive Officer

RJF:ha

CC: Edward Labaton, Esq.
Laurence M. Powers, Esq.
Alvin M. Kendis, Esq.
Mr. Daniel G. Hatcher
Mr. George Duthie
Mr. Ronald Rosenfeld
Mr. Theodore Ferrara
Mr. Basil Castrovinci
Mr. Arnold Perlmutter
Mr. Philip Belinsky
Mr. Joseph Levine
Mr. George Sinks
Mr. George Stewart

EXHIBIT 12, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

Telegram

714P EDT JUN 15 72 PA209 KB238
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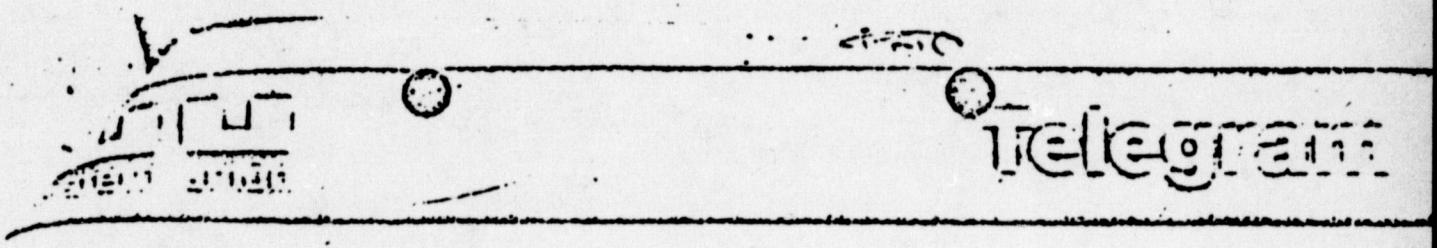
ROBERT J FRANKEL, CHAIRMAN OF THE BOARD
TITAN GROUP INC 1325 INWOOD TERRACE FORT LZE NJER
INFORMATION RECEIVED THAT HAROLD FAGGAN AND ROSE DOGAN HAVE BEEN DISCHARGED AS EXECUTIVES OF HAROLD FAGGAN ASSOCIATIES, INC. I AM DISTRESSED TO LEARN OF SUCH DISCHARGES AND SERVE NOTICE THAT THE ACCOUNT OF THE ITU INDUSTRIAL PENSION PLANS WILL BE WITHDRAWN UNLESS THEIR DISCHARGES ARE NULLIFIED. PLEASE ADVISE
JOHN J PILCH CHAIRMAN OF THE BOARDS ITU INDUSTRIAL PENSIONS PLANS.

EXHIBIT 12, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL

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PMSTITAN GROUP INC, DLR ONLY
1325 INWOOD TRRACE FORT LEE NJER

WE HAVE BEEN SERVICED BY HAROLD FAGGEN FOR GAR
EXTREMELY DISTURBED BY HIS REMOVAL
MARCO CICALA PRESIDENT LOC
L 365 UNITED AUTO WORKERS.

24.

SF-1201 (RS-69)

EXHIBIT 12, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL

Telegram

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ZCZC016 PDB SQNA NEW YORK NY 15 545P EDT
PMS
TITAN GROUP INC
1325 INWOOD TERRACE FORT LEE NJER 07024

ATTN MR ROBERT J. FRANKEL, CHAIRMAN OF THE BOARD:
JUST LEARNED OF YOUR ACTION WITH RESPECT TO HAROLD FAGGEN AND ROSE DOGAN AND OTHR EXECUTIVES AT HAROLD FAGGEN ASSOCIATES, INC. YOUR ACTIONS SEEMS UNFAIR, ARBITRARY AND RUTHLESS. UNDER THESE CONDITIONS WE DO NOT BELIEE THAT WE WILL BE ABLE TO CONTINUE IN OUR CLIENT RELATIONSHIP. WE URGE YOUR PROPMT RECONSIDERATION.
DAVID LIVINGSTON, CHAIRMAN OF DISTRICT 65 SEKURITY & PENSION

PLAN AND PRESIDENT DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA

EXHIBIT 12, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL

355P EDT JUN 15 72 PA175 P
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PMS ROBERT J FRANKEL
TITAN GROUP INC 1325 INWOOD TERRACE FORT LEE NJER 07024

HAVE BEEN ADVISED THAT HAROLD FAGGEN AND ROSE DOGAN ARE NO LONGER EMPLOYED OR ASSOCIATED WITH HAROLD FAGGEN ASSOCIATES. IF THIS IS TRUE THEN OUR 3 FUNDS WOULD BE FORCED TO LOOK ELSEWHERE FOR THE TYPE OF SERVICE WE HAVE BEEN RECEIVING FROM MR FAGGEN & MISS DOGAN
LOCAL 119 WELFARE PENSION & DISPLACEMENT FUNDS.
3 119.

SF-1201 (RS-69)

EXHIBIT 13, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL.

SHEIB, SHATZKIN & COOPER
235 EAST 42ND STREET · NEW YORK, N.Y. 10017 · (212) 687-8900

SIMON SHEIB
BERNARD SHATZKIN
BURTON S. COOPER
EDWARD TARAPOW
SHELDON RUDOFF
BURTON I. TABAT
ALLAN GRAFF
EDWIN L. SMITH

July 27, 1972

Lawrence M. Powers, Esq.
Powers and Gross
110 E. 59th Street
New York, N. Y.

In re: Employment of Faggen and Dogan

Dear Larry:

Bob Frankel's July 21, 1972 order of termination of the services of Harold Faggen and Rose Dogan was extended to and will expire on July 28, 1972.

If it is Titan's desire to rescind the order of termination, Harold Faggen and Rose Dogan will continue their employment solely for the benefit and convenience of Titan upon the following terms.

With respect to Faggen:

1. He is to be employed solely as a professional actuary.

2. He will receive the same salary and fringe benefits heretofore received.

3. He will reimburse Titan for Titan's clerical services used in connection with accounting services he personall renders to the clients of the Faggen Companies.

4. Titan will pay with the last salary check for July 1972 three weeks' accrued vacation pay, accrued through June 30, 1972.

5. Faggen's continued employment shall not be deemed a waiver of any rights which he claims have accrued to him, including but not limited to his claim that he is no longer bound by the restrictive covenants contained in his employment contract of December 2, 1968, by reason of your refusal to

EXHIBIT 13, ANNEXED TO AFFIDAVIT OF ROBERT JAMES FRANKEL





honor the notes delivered by Titan to him pursuant to the agreements dated December 2, 1968 or by the commencement of the lawsuit now pending in the U. S. District Court, Southern District of New York entitled Titan Group, Inc., Plaintiff against Harold Faggen, Defendant 72 Civ. 1797.

6. Termination of employment is to be accomplished by providing 30 days' written notice by either party.

7. Upon termination, Faggen will receive the full then present value of benefits, in a lump sum, of the Pension Funds in which Faggen is a beneficiary. To assure such payment, Titan covenants that it will not replace Faggen as a Trustee of said Pension Funds and simultaneously herewith authorizes Faggen to make such payments at the time of the termination of his employment.

With respect to Rose Dogan:

1. She is to be employed solely as a professional actuary.

2. She will receive the same salary and fringe benefits heretofore received.

3. Titan will pay vacation pay accrued through June 30, 1972 amounting to $40,950 in twelve (12) equal installments of $3,412.50, commencing with the month of July 1972. If employment is terminated for any reason, the unpaid balance of accrued vacation pay shall be paid in one lump sum with the last salary payment.

4. Termination of employment is to be accomplished by 30 days' written notice by either party.

5. Upon termination, Dogan will receive the full then present value of benefits, in a lump sum, of the Pension Funds in which Dogan is a beneficiary. Titan covenants that it will direct the Trustee of said Pension Funds to pay in lump sum the full then present value of said benefits.

If the aforesaid terms are acceptable, in order to expedite the continued employment until such time as appropriate papers can be drawn to be executed by both parties setting forth the above terms and conditions, a letter of acceptance by you on behalf of your client will satisfy present requirements

Very truly yours,

Burton S. Cooper

BSC:vc

REPLY AFFIDAVIT OF RICHARD K. MCINTYRE
IN SUPPORT OF DEFENDANT'S MOTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of Georgia,

County of Fulton, ss:

RICHARD K. MCINTYRE, being duly sworn, deposes and says:

1. I am a certified public accountant licensed in Louisiana since 1951. From 1958 until June 30, 1969, I was secretary-treasurer and chief financial officer of Titan Group, Inc., formerly known as the Futterman Corporation. I am presently employed by Ackerman & Company of Atlanta, Georgia, and reside at 3500 Hillstone Court, N. E., Atlanta, Georgia.

2. I have been requested by Mr. Faggen to be a witness in this case and Mr. Faggen has agreed to pay me $200 per day for each day that I take from my work to participate in the presentation of evidence in this case. I have no interest in the outcome of this case and I have agreed to serve as a witness for the sole purpose of revealing my knowledge of this transaction.

REPLY AFFIDAVIT OF RICHARD K. MCINTYRE

3. As secretary-treasurer and chief financial officer and a director of Titan, I was familiar with the financial aspects of the transaction which resulted in the acquisition by Titan of the Faggen Companies.

4. For the purpose of this affidavit, I have reviewed the complaint, answer, affidavits in connection with this motion, all the exhibits attached thereto, and all financial information available to me at the time of the transaction, as well as all contract documents and relevants minutes of the Board of Directors and Executive Committee of Titan.

5. I am aware that Titan contends

(a) That it relied on the Memorandum submitted to the Board on October 9, 1968 as a representation of the actual earnings of the Faggen Companies rather than on the representation of actual earnings contained in the contracts.

(b) That following acquisition, Titan was prevented access to the books and records of the Faggen Companies.

REPLY AFFIDAVIT OF RICHARD K. MCINTYRE

6. I state categorically that:

(a) I was aware that Exhibit 1A to the complaint, the Memorandum submitted to the Board without the words "excludes investment income", was a pro forma statement of historical pre-tax income adjusted to reflect additional pre-tax profit that might possibly have been earned by the Faggen Companies had the acquisition been made by Titan prior to 1968.

(b) I was aware in detail of most of the proposed savings and adjustments and I discussed them with Mr. Frank prior to the closing.

(c) I was aware that Mr. Faggen's representation of actual historical net income of the Faggen Companies was incorporated in the income tax returns annexed to the contract documents and not in the pro forma statement.

(d) Following the closing, the Titan staff and I had full and complete access to all of the books and records of the Faggen Companies for all periods referred to in Exhibit 1A.

The balance of this affidavit will supply further details with respect to these averments.

REPLY AFFIDAVIT OF RICHARD K. MCINTYRE

*The Memorandum Submitted to the Board of Directors*

7. Preliminarily, while the plaintiff refers to Exhibit 1A to the complaint as the Selling Memorandum, I never heard it referred to as such while I was employed by Titan. Exhibit 1A of the complaint (Exhibit 5B, Kaufman's affidavit) has been altered from Faggen's handwritten memorandum (Exhibit 5A to Kaufman's affidavit). The alteration consists of the addition in someone's handwriting of the words "excludes investment income".

8. As a member of the Board and as chief financial officer, I received a typed copy of Mr. Faggen's handwritten memorandum and it did not contain the words "excludes investment income". To my knowledge, neither I nor any member of the Board ever suggested that the pro forma statement excluded investment income, and I always regarded the investment income as part of the earnings of the Faggen Companies.

9. The caption on the memorandum plainly stated "Net Income - Pre-Tax *Adjusted to Basis* Which Will Prevail After Acquisition" (emphasis supplied). Thus,

adjustments to net income which were not explicitly set forth had to be made to reach the results shown in the memorandum. To properly analyze the pro forma figures, we had to know (a) the actual earnings, and (b) the adjustments. On its face, the document purports to be a pro forma statement for a period *prior* to acquisition and did not purport to be a projection of earnings *after* acquisition.

10. I was not privy to the discussions between Messrs. Kaufman, Frank and Faggen, which occurred prior to the Board meeting of October 9, 1968. Prior to the Board meeting, I was not consulted with respect to any adjustments to actual earnings to produce the pro forma statement. However, after the October 9th Board meeting, as the negotiations progressed, I was consulted and was advised to examine the actual earnings as reflected in the income tax returns delivered to Titan and to apply the adjustments to the earnings shown on the income transactions. If a Titan acquisition had occurred prior to 1968, this is what would have happened:

(a) First, on the face of the memo itself, there is set forth an item for 1968 of $35,280. designated "Harold Faggen Personal". These earnings would have been added to the earnings of the Faggen Companies because we understood that Harold Faggen received accounting fees in connection with work done for the client funds. Had Titan owned Faggen in 1968, this would have been paid over to Titan.

(b) There would have been an adjustment for executive salaries. In 1968 Harold Faggen received $87,700. and Rose Dogan, $50,400. In the contract documents setting forth the schedule of executive salaries, Harold Faggen was to receive $50,000. a year and Rose Dogan $40,000. a year. If Titan had owned Faggen in 1968, Titan would have paid $48,000. less to these executives.

(c) The amount of pension contribution in 1968 was $64,000. This would not have been paid had the acquisition been made prior thereto, because we understood that the pension fund was substantially overfunded.

(d) Because the profits were computed before all income taxes, there would have been a savings of and an adjustment for New York City and New York State income taxes.

(e) Finally, there would have been an adjustment for travel, entertainment and various other expenses because we recognized that such expenses are generally larger in a privately held business than in a public corporation.

While I was not aware of every detail of some of the adjustments referred to in Item (e) above, I was satisfied (and I so reported to Mr. Frank) that, assuming the accuracy of the income tax returns, the pro forma statement was a reasonably accurate statement of what the Faggen Companies' pre-tax income would have been in 1968, had the Faggen Companies been owned by Titan prior to 1968.

11. One further comment in this connection. The books of account of the Faggen Companies were kept on a cash basis as distinguished from accrual. All of my investigation and analysis was conducted on a cash basis of accounting from the tax returns

because there was no way to analyze these companies on an accrual basis of accounting and there was no reason to.

12. The Board of Directors turned over to the Executive Committee the function of analyzing and approving the transaction. (Minutes of October 9, 1968) Prior to the Executive Committee's approval, the contract documents were drawn and the financial statements, prepared by Joseph Warren & Co., were submitted to Titan. I reviewed these documents and reported my conclusions to the Executive Committee.

As indicated above, I was fully aware that Exhibit 5A to Kaufman's affidavit was a pro forma statement based on adjustments and it is difficult for me to believe that Mr. Frank regarded this pro forma as a statement of actual earnings (as indicated at ¶5, p.3 of his affidavit). I base my belief on my knowledge of Mr. Frank's financial acumen demonstrated to me while he was President of Titan, the form and content of the pro forma statement, and the following facts:

REPLY AFFIDAVIT OF RICHARD K. MCINTYRE

(a) I made Mr. Frank aware of the actual income reflected in the tax returns;

(b) Mr. Frank knew, or had reason to know, that the contract provided for a substantial reduction in the salaries of Harold Faggen and Rose Dogan;

(c) I discussed with Mr. Frank that the Faggen Companies had been overfunding their Pension Plan;

(d) Mr. Frank knew that the memorandum itself contained an item of $35,280. for Harold Faggen Personal which would have been added to the Faggen Companies' earnings had the acquisition been consummated before 1968;

(e) Mr. Frank acknowledges (¶5, p.3) that generally a profitable and privately held business charges larger amounts to travel and similar expenses than does a public company.

At ¶7, Mr. Frank states that Faggen never explained the adjustments prior to closing. The fact is that Mr. Frank was informed by me of the nature of the adjustments and thus he was fully aware of them when, on Titan's behalf, he signed the contracts.

REPLY AFFIDAVIT OF RICHARD K. MCINTYRE

*The Executed Contracts*

13. The contract documents are contained in two large bound volumes. My responsibility in connection with these contracts was to analyze the earnings figures as shown on the tax returns contained therein and to satisfy myself as to their authenticity. The contracts specifically obligated Mr. Faggen to represent and warrant the accuracy and reliability of earnings therein shown. The actual earnings and balance sheets of the Faggen Companies set forth in the contract documents were reviewed with Mr. Frank on the day and night of December 2, 1968. (As a matter of fact, I had picked up an item of accrued vacation pay in one of the balance sheets and, when I pointed this out to him, he balked at closing unless this item was deleted. As a result, negotiations on the night of the closing resulted in a supplemental indemnification by Harold Faggen (Exhibit A)).

The contract documents do not contain any representation or warranty by Mr. Faggen as to the pro forma statement (Exhibit 1A to the complaint).

I was aware that Mr. Kaufman, who had negotiated this transaction, had received the drafts of the proposed contracts prior to their execution. The Executive Committee approved the contracts.

14. Mr. Hatcher, with all due respect to him, first became a financial officer in Titan in November 1970. He had absolutely no connection with or responsibility in this transaction. I did. Mr. Hatcher makes many assumptions, which are clearly erroneous. For example:

(a) Faggen intended to exclude investment income in Exhibit 5A (p.7). He did not.

(b) The actual earnings per tax returns were not fully disclosed (¶7). They were.

(c) Executive salaries and pension overfunding were not to be treated as an adjustment, (¶11, p.12) (¶12, p.13). They were.

(d) That accrued vacation pay was omitted (¶13, p.13). It was not.

(e) That Faggen did not turn over to Titan $175,000. in Treasury bills (¶17, p.15). He did.

## REPLY AFFIDAVIT OF RICHARD K. MCINTYRE

*The Availability of the Faggen Books and Records to the Personnel of Titan*

15. After the acquisition, I directed J. V. Russo, James Cannon and Martin Sokolow of my staff to examine the books and records of the Faggen Companies. Weeks were spent examining the books and records which were made fully available and from this examination we made the opening entries of September 30, 1968, and the closing entries of December 31, 1968.

Mr. Hatcher's statement at ¶3, p.3, of his affidavit that Titan's personnel were barred from Faggen's books after the acquisition because Mr. Levine and Mr. Faggen maintained effective control is not true. During my tenure as chief financial officer, I had no difficulty in securing any and all books and records which reflected the activities of the Faggen Companies. Indeed, I cannot understand Mr. Hatcher's assertion that Titan personnel could not get at the Faggen books, since I note that all Titan's annual reports since and including 1968, have been fully certified by the company's auditors.

(Sworn to by Richard K. McIntyre, October 10, 1972.)

EXHIBIT A, ANNEXED TO REPLY AFFIDAVIT OF RICHARD K. McINTYRE.

March 5, 1969

Titan Group, Inc.
529 Fifth Avenue
New York, New York
- and -
Harold Faggen Associates, Inc.
853 Broadway
New York, New York

Gentlemen:

This is to confirm the agreement which I made on December 2, 1968, upon the acquisition by Titan Group, Inc. of all of the issued and outstanding shares of capital stock of Harold Faggen Associates, Inc., a New York corporation. Notwithstanding anything to the contrary contained in the Agreement relating to the above described acquisition, in the Exhibits annexed thereto, or in a Schedule delivered at the closing reflecting the amount of $18,413.68 payable to me as accrued vacation pay, I hereby waive any and all rights which I may have to receive any accrued vacation pay which may be due and owing to me by Harold Faggen Associates, Inc. prior to December 2, 1969.

Notwithstanding anything to the contrary contained in the above referred to Agreement, in the Exhibits annexed thereto, or in a Schedule delivered at the above described closing reflecting the amount of $18,150.84 payable to Rose Dogan as accrued vacation pay, I hereby agree to indemnify and save and hold you harmless from any amount which you may

**EXHIBIT A, ANNEXED TO REPLY AFFIDAVIT OF RICHARD K. McINTYRE**



be called upon to pay to Rose Dogan in respect of accrued vacation pay prior to December 2, 1969.

Very truly yours,

Harold Faggen

REPLY AFFIDAVIT OF HAROLD FAGGEN IN SUPPORT OF DEFENDANT'S MOTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,

County of New York, ss:

HAROLD FAGGEN, being duly sworn, deposes and says:

*Preliminary*

1. The keystone of the plaintiff's claim is that an alleged representation of net income contained in a pro forma statement (prepared during negotiations) captioned "Net Income Pre-Tax Adjusted to Basis Which Will Prevail After Acquisition" is superior to and supersedes the contractual express representation and warranty on the same subject, namely, net income.

2. Plaintiff's recent audit of the books and records for the years preceding acquisition specifically reconfirms the accuracy of the express contractual representations and warranties of net income.

3. Plaintiff has defaulted and refuses to make interest payments due on the negotiable promissory notes it issued to me when it acquired my companies. Plaintiff retains ownership of the companies. Plaintiff has

withdrawn from these companies $2.3 million in cash and securities. Plaintiff has, to date, paid me $660,000 in interest, leaving a credit balance in my favor of not less than $1.6 million. Plaintiff is aware that I need the interest payments on the notes to meet current obligations. Plaintiff refuses to pay the interest pending the outcome of the lawsuit.

I. *The Plain Uncontroverted Facts Are:*

4. Titan and I executed fully negotiated arms-length agreements on December 2, 1968. Mr. Kaufman, as Special Counsel for Titan, prepared the first draft of the agreements in October 1968 and reviewed the subsequent drafts (Kaufman affidavit ¶26, p. 23). Paragraphs 3 and 3.1 of Kaufman's first draft are tracked through ¶¶ 3 and 3.1 of the final draft (Appendix A). Both deal with representations and warranties of Income Statements and Balance Sheets. Experienced counsel never made the pro-forma statement (Exhibit A Faggen affidavit June 7, 1972, Exhibit 5A, Kaufman affidavit) a matter of contract.

5. The executed agreements contained financial statements in the form of income tax returns for each of the five preceding fiscal years ended in 1964-1968;

said financial statements (except for short stub period financials for the periods from the end of each corporation's 1968 fiscal year to September 30, 1968) were the only financial statements included in the contract documents. Their accuracy has never been challenged and Mr. Hatcher's affidavits, specifically Exhibit E-1 through E-4 thereof, (plaintiff's recent computation of earnings of the Faggen Companies after examination and audit of Faggen Companies' books and records) reconfirms that my contractual representations were completely accurate.

6. No claim is made of misrepresentation or breach of warranty in connection with the carefully drawn contract documents.

7. Prior to the execution of the contracts on December 2, 1968, plaintiff, through its counsel, special counsel, and financial personnel, examined all the financial statements which were incorporated in the executed contracts (Kaufman affidavit, ¶25, p. 22).

II. *The Transaction*

8. The business sold to plaintiff was founded and built by me over a period of twenty years into one of the foremost actuarial consulting firms in the United

States. In plaintiff's 1971 Annual Report, mailed after the commencement of this action, this business was described as follows:

> "Titan also offers a wealth of experience in actuarial, consulting and computer services through its Harold Faggen Associates, Inc. subsidiary in New York City. Faggen's experience in actuarial studies and in formulation of pension plans for multi-employer pension funds dates back to the establishment of the first such plan in this country. The Faggen team includes specialists in law, accounting and economics. Its services include annual reviews of pension programs to monitor their effectiveness."

9. Pursuant to the contracts, plaintiff acquired a business which had earned some $365,000 in 1968. Over and above these earnings, I personally drew $122,000 in salary and fees. In addition to my direct remuneration, the Companies made pension contributions, substantially for my benefit, of $64,000 in 1968.

REPLY AFFIDAVIT OF HAROLD FAGGEN

10. The business purchased by plaintiff contained all the assets necessary to conduct the actuarial business as well as marketable securities, with a fair market value on the day the contract was signed, of more than $1,300,000. Plaintiff took possession of the securities promptly after the closing.

11. The plaintiff also withdrew from the Faggen Companies more than $900,000 in cash, while directing that the earnings of the actuarial business be used to finance an expansion into a data processing business, one not previously conducted by the Faggen Companies.

12. In consideration for the transfer of this business and its $1,300,000 securities portfolio, I received subordinated promissory notes of the plaintiff in the aggregate principal face amount of $5,500,000 with interest at 4% per annum, payable in ten years. Amortization, however, was not to commence until the sixth year! The fair value of those notes was substantially less than the principal face amount. In my opinion, the notes were not worth more than $4,000,000, hardly ten times $571,000.

13. Thus far, I have been paid $660,000 in interest on the notes. In April of this year, simultaneously with the commencement of this action, plaintiff wilfully defaulted

on the interest payments due thereon, while retaining all of the cash benefits it had derived by virtue of the acquisition. Plaintiff, while seeking rescission, retains the $1,600,000 exclusive of interest, which it has received, over and above the amounts paid to me, and has not offered to deposit this sum into court.

III. *Lacking a Factual Basis on Which to Set Aside the Agreement, Plaintiff Contrives a Case Designed to Divert the Court from the Enforcement of the Contract*

14.

| Plaintiff Claims | My Response |
|---|---|
| A. Prior to the institution of the lawsuit, the financial books and records of the Faggen Companies were withheld. | They were not. (McIntyre's affidavit, plaintiff's own admissions). |
| B. My financial statements annexed to the contract documents were not to be relied upon because my accountant did not certify them. | My accountant's certification was not required because I specifically represented and warranted the accuracy of my financial statements. (Contract ¶3 and 3.1) |
| C. The handwritten memorandum (my pro-forma analysis Exhibit A Faggen affidavit June 7, 1972, Exhibit 5A Kaufman affidavit) was a representation of actual earnings superseding all contractual representations. | The pro forma was an analysis and not a representation. Plaintiff acknowledges that the memorandum was a pro forma (Kaufman affidavit, p. 13, Frankel affidavit ¶1, p. 1); that it was meaningful only if adjustments were made to net income (Kaufman affidavit pp. 17 and 18); that my income tax returns demonstrated net income and |

| | |
|---|---|
| | were the key disclosure documents (Kaufman affidavit p. 21); that it had my income tax returns from the inception of negotiations (Kaufman affidavit p. 21); it never requested that the pro forma be annexed to the contract or be the subject of a contractual representation or warranty. (See Kaufman's affidavit first draft of contract Exhibit 7 and Exhibit C Faggen affidavit June 7, 1972.) |
| D. Plaintiff's action was brought in good faith. | It was not. Since early 1971, Frankel has attempted to break the contract and has used every coercive device to compel me to convert my notes to stock. This lawsuit is the culmination of those efforts. |
| E. The amounts which Titan withdrew from the Faggen Companies in cash and securities was less than $2 million. | Titan withdrew $1.3 million in securities and $900,000 in cash. |
| F. I lack "clean hands" in that after the default on the notes and the institution of the lawsuit, I threatened to breach the restrictive covenant in my employment contract and to solicit the clients of the Faggen Companies. | Titan defaulted on the notes, instituted this action to rescind the contract claiming they were void, discharged me, and threatened to deprive me of all income. I responded that it could not treat the contracts as void and at the same time expect me to be bound by them. However, I neither threatened to nor solicited the Faggen Companies' clients. |

## REPLY AFFIDAVIT OF HAROLD FAGGEN

### A. *The Books and Records Were Not Withheld*

15. Crucial to plaintiff's claim that it is justified in bringing this lawsuit 3-1/2 years after the closing of the transaction, is its contention that, during the 3-1/2 year period, I concealed from plaintiff the books and records of the Faggen Companies for the years 1965 to 1968. At all times the books and records were always in Titan's possession either on the premises of the Faggen Companies or in Kentucky. Nothing was withheld.

16. Mr. McIntyre avers that he secured the books and records of the Faggen Companies immediately after acquisition and thereafter never encountered any difficulty in securing them. Shortly after acquisition, the books and records were examined in order to make the opening entries of September 30, 1968 and the closing entries of December 31, 1968. (See Russo's memorandum Exhibit A Hatcher affidavit directing Titan's auditors as to how to conduct the audit.) Even Messrs. Kaufman and Frank, respectively, Chairman of the Board and President of the plaintiff during the period following the acquisition, carefully avoid corroboration of Mr. Frankel's false averment to Count Two of the complaint.

REPLY AFFIDAVIT OF HAROLD FAGGEN

17. The complaint, verified by Mr. Frankel on April 26, 1972, alleges that I withheld the original books and records for the period 1965 to 1968 and refused to make them freely available to Titan (Complaint ¶¶ 16, 19 and 20). Even without the proof furnished by Mr. McIntyre, the documentary facts in the plaintiff's own papers prove otherwise.

(i) On April 17, 1972, in response to letter of February 9, 1972, my counsel advised plaintiff's counsel that at all times all of the books of the Faggen Companies were in Titan's possession and still are and that "they were taken to Kentucky by corporate officials and have recently been returned. You were told that you were free to examine those books at any time up to now and you are certainly free to examine them now" (Hatcher Exhibit D).

(ii) By letter dated April 21, 1972 (five days before the complaint was verified), plaintiff's counsel acknowledged that "Ledger material and certain supporting data has been made available to Dan Hatcher, part of it before our conversation in my office and a great deal of additional material after our conversation. These were all present at the offices of the Faggen Companies,

and as you pointed out, these have been and are the property of Titan Group, Inc."

18. The indisputable fact is that the records have been available to the plaintiff since December 1968. Simply preposterous is plaintiff's charge that I gave it my income tax returns, gave up $1,300,000 in securities, permitted withdrawal of $900,000 in cash while jealously guarding my books. Plaintiff's dishonesty in alleging that I withheld the books and records is exceeded only by its dishonesty in suppressing the ultimately dispositive fact: that upon examination of the books and records of the Faggen Companies, it found that the representations of income that I made in the contracts were entirely accurate (*infra*, p. 11).

19. Thus, Count Two of the complaint is on its face sham, as is plaintiff's excuse for its delay in bringing this action.

B. *The Absence of Accountant's Certification Did Not Render My Financial Statements Unreliable*

20. The plaintiff knew that my financial statements in the form of Income Tax Returns were not certified. But it also knew that I represented and warranted the

accuracy of the income therein shown. The absence of accountant's certification is not, contrary to plaintiff's assertion, synonymous with unreliability. Indeed, if they were false, then I was subject to civil and criminal liability under the Income Tax Laws. If plaintiff's assertion were true, why did it demand that I represent and warrant the accuracy of my financial statements? Plaintiff's assertion carried to its logical conclusion means that it asked me to warrant what it knew was unreliable. Conversely, it follows that my contractual representations and warranties were of no importance to plaintiff. Parenthetically, I note that my pro forma statement was also not certified. In plaintiff's lexicon this would mean that it, too, was unreliable. The conclusion is irresistible. Its present action is based on the unreliable.

21. Logic aside. My financial statements were the subject of a specific contractual representation and warranty (Contracts Exhibit C Faggen affidavit June 7, 1972). My financial statements were reliable and were relied on. To this day, their accuracy and reliability are unchallenged. Plaintiff has never asserted that my contractual representations and warranties were false.

REPLY AFFIDAVIT OF HAROLD FAGGEN

22. Hatcher's analysis in Exhibits E-1 through E-4 of his affidavit verifies the accuracy of my contractual representations and warranties of net income. Those exhibits are Hatcher's reconstruction of the Faggen Companies' net income for the period 1964-1968. They coincide almost dollar for dollar with the earnings statements in the income tax returns (Plaintiff's Exhibit C) which were inserted in the agreements in lieu of certified statements of income which I did not have. The income, as well as the details showing the various expenses which are deducted from the gross revenues, are also shown on the tax returns. To graphically demonstrate the accuracy of the representations made by me in the contract as to my income, I have prepared a comparison of the income and expenses of each of the Faggen Companies as shown on the tax returns with the figures which Mr. Hatcher so laboriously reconstructed from the books and records of the Faggen Companies. The analysis demonstrates the accuracy of the representations that I made in 1968.

# REPLY AFFIDAVIT OF HAROLD FAGGEN

HAROLD FAGGEN ASSOCIATES, INC.

Cash Basis Income Statements
Years Ended June 30

| | 1965 | | 1966 | | 1967 | | 1968 | |
|---|---|---|---|---|---|---|---|---|
| | Per Hatcher Exhibit E-1 | Per Tax Return attached to Contract | Per Hatcher Exhibit E-1 | Per Tax Return attached to Contract | Per Hatcher Exhibit E-1 | Per Tax Return attached to Contract | Per Hatcher Exhibit E-1 | Per Tax Return attached to Contract |
| al Revenues | 723,247 | 723,247 | 833,587 | 833,587 | 861,570 | 857,997 | 953,777 | [illegible] |
| al Costs and penses | 536,015 | 535,070 | 543,805 | 542,895 | 673,187 | 672,426 | 663,472 | 662,231 |
| fit before eral Income xes | 187,232 | 188,177 | 289,782 | 290,691 | 188,383 | 185,571 | 290,305 | 288,494 |

ACTUARIAL TABULATING CORPORATION

Cash Basis Income Statements
Years Ended March 31

| | Per Hatcher Exhibit E-2 | Per Tax Return attached to Contract | Per Hatcher Exhibit E-2 | Per Tax Return attached to Contract | Per Hatcher Exhibit E-2 | Per Tax Return attached to Contract | Per Hatcher Exhibit E-2 | Per Tax Return attached to Contract |
|---|---|---|---|---|---|---|---|---|
| l Revenues | 82,388 | 82,388 | 82,317 | 82,317 | 81,844 | 81,844 | 90,846 | 90,846 |
| l Costs and nses | 43,795 | 43,795 | 44,732 | 44,732 | 42,706 | 42,706 | 50,801 | 50,801 |
| it before ral Income xes | 38,593 | 38,593 | 37,585 | 37,585 | 39,138 | 39,138 | 40,045 | 40,045 |

# REPLY AFFIDAVIT OF HAROLD FAGGEN

EMPLOYEE FUND SERVICES CORPORATION
Cash Basis Income Statements
Years Ended September 30

| | 1965 | | 1966 | | 1967 | | 1968 | |
|---|---|---|---|---|---|---|---|---|
| | Per Hatcher Exhibit E-3 | Per Tax Return attached to Contract | Per Hatcher Exhibit E-3 | Per Tax Return attached to Contract | Per Hatcher Exhibit E-3 | Per Tax Return attached to Contract | Per Hatcher Exhibit E-3 | Per Tax Return attached to Contract |
| ral Revenues | 32,893 | 32,893 | 28,004 | 28,004 | 26,283 | 25,309 | 29,483 | 29,483 |
| tal Costs and Expenses | 1,883 | 1,883 | 3,978 | 3,978 | 3,712 | 3,712 | 3,523 | 3,523 |
| ofit before deral Income axes | 31,010 | 31,010 | 24,026 | 24,026 | 22,571 | 21,597 | 25,960 | 25,960 |

FUND S & E CORPORATION
Cash Basis Income Statements
Year Ended June 30, 1968

| | Per Hatcher Exhibit E-4 | Per Tax Return attached to Contract |
|---|---|---|
| tal Revenues | 10,559 | 10,559 |
| fessional e Expense | 83 | 83 |
| fit before eral Income axes | 10,476 | 10,476 |

23. All reference to the absence of accountant's certification, therefore, in light of my contractual representations and warranties which Hatcher now re-verifies, is nothing more than a red herring.

C. *The Handwritten Memorandum (Faggen Exhibit A to affidavit June 7, 1972, Kaufman Exhibit 5A) Was a Pro Forma Analysis and Not a Representation of Actual Earnings*

24. Frankel succinctly states the basis of plaintiff's claim:

> "Our grounds are that Harold Faggen misled the Board of Directors of Titan in office in 1968 into making this acquisition, *based upon artificially inflated pro forma statements of earnings*" (Frankel's affidavit ¶1, p. 1). (Italics supplied.)

25. Kaufman says that my handwritten memorandum (Exhibit A Faggen affidavit June 7, 1972, Kaufman affidavit 5A), was for the purpose of presenting "a picture to Titan of 1968 earning power on a *pro forma realistic basis*" (Kaufman affidavit p. 13). Kaufman also states that:

REPLY AFFIDAVIT OF HAROLD FAGGEN

"We understood Exhibit A (and its predecessor) of Faggen's selling memorandum to be a restating of the earnings of the Faggen Companies, on a combination cash and accrual basis for the four years, as contrasted with the cash basis for reporting income sometimes used by private corporations to defer taxes as long as possible (until cash was actually received), *together with the adjustments which would prevail after the acquisition was made*" (Kaufman affidavit pp. 17 and 18). (Italics supplied.)

and that:

"In connection with the contracts prepared by the Robinson firm, a set of financial statements were ultimately obtained and incorporated by reference into the contracts. These financial statements were supplied late in October by Joseph Warren & Co. under date of November 25, 1968 and the transaction closed a week later on December 2, 1968. The Joseph Warren & Co. financial statements which were incorporated by reference into the contracts were

supplied to the management of Titan just before the closing, *but Joseph Warren's main income statement (for Harold Faggen Associates, Inc.) was the same tax return for the year ending June 30, 1968 that Faggen had already supplied to me in September as part of Exhibit 4. This key disclosure of the earnings base was nothing new and did not supersede the expansion from that base set forth in Exhibits 4 and 5A"* (Kaufman affidavit p. 21). (Italics supplied.)

and that:

"Moreover, with respect to income of the corporations, they were not the usual form of profit and loss accounting statements; they were just tax returns. *I already had had the key tax return (since September 1968) for the main corporation's year ended June 30, 1968 (part of Exhibit 4), and the adjustments which built up to $571,000 pre-tax earnings were all based on the $288,494 starting point contained in this tax return."* (Kaufman affidavit p. 22). (Italics supplied.)

26. Plaintiff, therefore, acknowledges:

(a) The memorandum was a pro forma and not a statement of actual earnings.

(b) It had my income tax returns and knew what my actual earnings were.

(c) That the income reflected in the memorandum was based on adjustments and plaintiff knew it.

27. Plaintiff's own papers belie its claim that the memorandum was a representation of the pre-tax net income of the Faggen Companies (Complaint ¶5a, 9). By its own admission, it was nothing more than an analysis of the pre-tax net income on an adjusted basis. Which is expressly what it stated on its face - "Net Income Pre-Tax Adjusted to Basis Which Will Prevail After Acquisition". Mr. Kaufman's acknowledgement that my income tax returns were the "key disclosure" of my net income makes plaintiff's claim (Complaint ¶5a, 9) that I misrepresented my net income incomprehensible.

28. In the face of Kaufman's statements, Mr. Frank's averments are totally incredible. Frank says:

REPLY AFFIDAVIT OF HAROLD FAGGEN

"I read and relied upon it (Exhibit 1 to the complaint), particularly the statements of earning power for the four years described therein. These basic figures had been talked about by Harold Faggen prior to his writing up the memorandum, and while he had made some statements about various savings, such as pension overfunding, which would occur after the acquisition, they were never tied specifically into these numbers. *I accepted his statements of earning power for the four years as hard numbers, without most of the adjustments built in which he had referred to in his affidavit in vague terms. I assumed that any future savings in travel and entertainment expenses or other savings* from the tightening up when Faggen Companies became subsidiaries of a publicly held company *would only increase earnings. I had no idea that Harold Faggen had a set of unspecified savings and adjustments in mind ('travel and entertainment expenses', 'executive salaries'), when he presented the 'net income - pre-tax'which is part of Exhibit 5 to the Kaufman affidavit * * *.* If such

assumptions were indeed in Mr. Faggen's mind they certainly were never communicated to me (except for pension overfunding) or to any other member of the board of Titan in October 1968 when we made the decision to buy his companies for $5,500,000.00 in notes" (Frank affidavit ¶5, p. 3). (Italics supplied.)

29. As further evidence of Frank's unreliability, in attempting to demonstrate that my 1972 explanations of the adjustments utilized in preparing the pro forma statement were made up out of the whole cloth, he states:

"However, the explanation for the 'adjusted figures' as 'including a cut in Rose Dogan's salary' and (Exhibit 1) 'relating recent statements in justifications by Mr. Faggen' is an attempt to put an after-the-fact occurrence carried out on a voluntary basis by Harold Faggen as an intention before the acquisition. Rose Dogan's salary was never discussed with me or anyone else in Titan before the acquisition and would appear to be a 1972 explanation for unsubstantiated adjustments made in 1968

by Mr. Faggen. Prior to the transaction, I had no reason to consider her an integral element in the compensation package being discussed with Mr. Faggen and adjustments in her salary were never discussed prior to the transaction" (Frank affidavit ¶11, p. 7).

30. Had Mr. Frank taken the trouble in 1972 to read the contracts which he signed in 1968, he would have seen that the contract documents themselves (Exhibit J) provided a salary for Rose Dogan of $40,000 a year, which was a reduction of more than $10,000 from what she had previously earned. He would also have realized, therefore, that contrary to his averment, she was "an integral element in the compensation package". In the face of the contracts, the qualifying words of the handwritten memorandum, and Kaufman's admissions, all specifically refuting Mr. Frank, I find it incredible that Titan should claim that the pro forma statement was a statement of actual earnings.

31. Finally, as the caption of Exhibit A annexed to the statement itself makes clear, this pro forma statement was a retrospective analysis of what the operations

of my companies would have been had Titan acquired these companies prior to 1968. It was not designed to be, and could not be, interpreted as a projection.

*Genesis of the Pro Forma Memorandum*

32. Messrs. Kaufman and Hatcher attempt to create the impression that there was chicanery in the fact that the total of the figures on the handwritten sheets, which I gave Kaufman at our first meeting on September 6, 1968 (Kaufman Exhibit 4), was almost the same as the total of the figures in the last column of Exhibit A to the handwritten memorandum which I prepared after our meeting on October 2, 1968 (Kaufman Exhibit 5A).

33. While both the handwritten statements (Kaufman Exhibits 4, 5A) which Kaufman now says he relied on, were obviously not relied on and, therefore, immaterial, I, nevertheless, do not want to leave this court with any thought that I may have presented Diebold and Titan with contradictory sets of figures, and, for that reason alone, I have attached hereto an appendix which explains each adjustment (Appendix B).

34. Kaufman was well aware in 1968 that the earlier figures differed substantially from the later figures and

he knew why they were different. As a matter of fact, it would have been impossible for anyone looking at both handwritten statements not to see the differences at a glance. Since Exhibit 4 contained the figures for only one year, one need only compare these figures with the figures in the last column of the later statement which was prepared at Mr. Frank's request after our meeting on October 2, 1968 and which Kaufman now avers he thought contained no changes.

35. The following table sets forth in typed form the two pages of handwritten figures which I gave Kaufman on September 6, 1968 (Diebold Memorandum) and Exhibit A to the handwritten memorandum which I prepared after our meeting on October 2, 1968. Copies of the original handwritten sheets for Diebold are similarly set forth in Appendix B to this affidavit which contains an analysis of the differences.

# REPLY AFFIDAVIT OF HAROLD FAGGEN

FIRST PAGE KAUFMAN'S EXHIBIT 4

| | | |
|---|---|---|
| Emp. Fund Services: F.Y.End 9/30/67 | | |
| Net Income | 21,597 | |
| Deduct Investment Income | 2,652 | |
| Balance | 18,945 | |
| Add Back State & City Income Taxes | 2,755 | |
| | 21,700 | 21,700 |
| Act.Tab. -Fiscal Y. End 3/31/68 | | |
| Net Inc. | 40,045 | |
| Deduct Invest.Income | 10,756 | |
| Balance | 29,289 | |
| Add -State & City Income Taxes | 3,814 | |
| | 33,103 | |
| Salaries | 12,000 | |
| Pension | 6,348 | 51,451 |
| Fund S & E Corp. -F.Y.End 6/30/68 | | |
| Net Inc. | 10,416 | |
| Special Work in Process | 3,500 | 13,916 |
| H.F.A.Inc. -(see separate sheet) | | 391,329 |
| | | 478,396 |
| Adjustment for Services | | 35,280 |
| Special Work in Process | | 25,000 |
| | | 538,676 |
| Expense Items that will not recur | | 32,800 |
| | | 571,476 |

SECOND PAGE KAUFMAN'S EXHIBIT 4

Adjustments

| | | |
|---|---|---|
| Net Per Return | | 288,494 |
| Deduct Investment Income | | 31,905 |
| Balance | | 256,589 |
| Add Back -State & City Income Taxes | | 14,820 |
| Total | | 271,409 |
| Salary Adjustment -(loan at 6/30/68) | 25,700 | |
| Pension Prepayment | 58,108 | |
| Salaries Pd. to 12/31/68(can be treated as loans) | | |
| Rose | 22,950 | |
| Ceo | 13,162 | |
| | 119,920 | 119,920 |
| | | $391,329 |

# REPLY AFFIDAVIT OF HAROLD FAGGEN

KAUFMAN'S AFFIDAVIT EXHIBIT 5A

EXHIBIT A

Net Income - Pre-Tax
Adjusted to Basis Which Will
Prevail after Acquisition

| | Fiscal Years Ending In: | | | |
|---|---|---|---|---|
| | 1965 | 1966 | 1967 | 1968 |
| Harold Faggen Associates, Inc. (June 30) | $ 253,357 | $ 367,087 | $ 332,192 | $ 430,596 |
| Actuarial Tabulating Corp. (March 31) | 59,878 | 60,976 | 59,201 | 65,806 |
| Employee Fund Services Corp. (Sept. 30) | 32,767 | 27,891 | 25,252 | 29,104 |
| Fund S & F Corp. (June 30) | — | — | — | 10,476 |
| Harold Faggen, Personal (Dec. 31) | 34,800 | 34,800 | 35,240 | 35,280 |
| Totals | $ 380,802 | $ 490,754 | $ 451,885 | $ 571,262 |

REPLY AFFIDAVIT OF HAROLD FAGGEN

36. Kaufman is intentionally falsifying my position. He knew that the adjustments which went into the figures I gave him at our first meeting on September 7 were not the same as the adjustments which went into the figures in the last column of the Exhibit I prepared in October on the basis of our two meetings.

37. The following few short paragraphs demonstrate how impossible it would have been for any reasonable person to have believed that the later figures were merely a restatement of the earlier figures:

(a) Adjusted totals for Harold Faggen Associates, Inc.:

Per Diebold Memorandum-Kaufman Exhibit 4 $391,329

Per Titan Memorandum-Kaufman Exhibit 5A $430,596

(b) Adjusted totals for Actuarial Tabulating Corp.:

Per Diebold Memorandum-Kaufman Exhibit 4 $51,451

Per Titan Memorandum-Kaufman Exhibit 5A $65,806

(c) Adjusted totals for Employee Fund Services Corp.:

Per Diebold Memorandum-Kaufman Exhibit 4 Fiscal Year End 9/30/67 $21,700

Per Titan Memorandum-Kaufman Exhibit 5A Fiscal Year End 9/30/68 $29,104

(d) Adjusted totals for Fund S & E Corp.:

Per Diebold Memorandum-Kaufman Exhibit 4 $13,916

Per Titan Memorandum-Kaufman Exhibit 5A $10,476

(e) Adjustment for Services rendered by Harold Faggen Personal:

Per Diebold Memorandum-Kaufman Exhibit 4 $35,280

Per Titan Memorandum-Kaufman Exhibit 5A $35,280

(f) The Diebold Memorandum-Kaufman Exhibit 4 contained an item "Special Work in Process $25,000".

The Titan Memorandum-Kaufman Exhibit 5A contained no similar item.

(g) The Diebold Memorandum-Kaufman Exhibit 4 contained an item "Expense Items that will not recur $32,800".

The Titan Memorandum-Kaufman Exhibit 5A contained no similar item.

(h) The Diebold Memorandum-Kaufman Exhibit 4 totalled $571,476.

The Titan Memorandum-Kaufman Exhibit 5A totalled $571,262.

38. Kaufman admits that he knew at our first meeting that I had been discussing merger with Diebold (Kaufman affidavit p. 6) and he knew that the figures on the

sheets which I gave him had been used in my discussions with Diebold. He saw the notations on the backs of the adjustment sheets in my handwriting and the handwriting of the Diebold representative so that there could have been no doubt. Copies of both sides of these adjustment sheets are attached (Exhibit K). Kaufman also admits (Kaufman affidavit p. 7) that the deal I proposed was "no less than 20 times earnings + Net Worth - with earnings excluding investment income". Kaufman is silent, however, with respect to the fact that, at our first meeting, he rejected the basis on which some of the adjustments had been made in connection with the Diebold negotiations; he refused to consider any deal in which Net Worth would be paid for separately; and he wanted to see how the adjustments he would be willing to accept would have affected the net earnings as shown in income tax returns for the past four years and not for 1968 alone.

39. Giving effect to the adjustments we discussed, dealing only with 1968 and for all companies, my salary would have been reduced from $87,500 to $50,000; Rose Dogan's salary would have been reduced from $50,400 to $40,000; my $35,000 professional fee income received as

an accountant for work performed for actuarial client funds would have been income to Titan; the pension contributions would have been reduced by $64,000 by virtue of overfunding and salary reductions; city and state income taxes of approximately $21,000 were to be eliminated because the presentation was to be expressed on a pre-tax basis and other miscellaneous expenses such as travel and entertainment, apartment rent, boat, automobiles, etc., would have been reduced by $37,000 to reflect the realities of the change from a private to a public company. The total of these retrospective adjustments would have been $205,000. If these adjustments had been added to the actual pre-tax income for the fiscal years ended in 1968, on a pro forma basis, the pre-tax income would have been approximately $570,000. Investment income, as my handwritten memorandum makes clear, was included in the pro forma. There was no exclusion of investment income as appears on the typed copy attached to the complaint as Exhibit 1A and Kaufman affidavit Exhibit 5B. Notwithstanding Hatcher's affidavit to the contrary (¶5, p. 7) a careful reading of the Kaufman and Frank affidavits disclose: that, nowhere in the pro forma calculations was investment income to be excluded. All Kaufman says is

that net worth had to be part of the package (Kaufman affidavit p. 10).

40. Finally, the price was not based on a multiple of ten times the pre-tax earnings on a pro forma basis. If it had been, I should have received $5.7 million in cash or equivalent, not $5.5 million in paper worth about $4 million.

41. There are two things wrong with the plaintiff's allegation that my memorandum was a false statement of my actual earnings. First, it was not a statement of my actual earnings and plaintiff knew it and, second, it was not false and plaintiff knew it. As to the second, it was an absolutely honest statement of what the net income of my companies prior to 1968 would have been had Titan owned my companies prior to 1968 and, if the adjustments to net income which Kaufman, Frank and I had discussed, had been made. As to the first, the memorandum was never intended to replace my financial statements as a statement of actual earnings, and Titan had copies of my financial statements from the beginning of negotiations in the form of my income tax returns (Kaufman affidavit p. 21). If plaintiff relied on Exhibit A to my handwritten statement as a representation of the actual earnings,

why was not that exhibit annexed to the contracts? If the pro forma earnings were believed by plaintiff to be a representation of actual earnings, then what was the purpose of annexing the income tax returns to the contract? If the income tax returns did not reflect the representation as to earnings, where in the contract is the all important representation as to earnings? After all, plaintiff cannot seriously contend that the contract documents included no representation as to earnings. Here, that representation is in .) of the contracts, which is headed "Representations and Warranties of the Seller" below which is ¶3.1 headed "Financial Statements" and which incorporates by reference the financials in the tax returns (Appendix A).

42. Neither Mr. Kaufman nor any of the affiants enlisted by the plaintiff to submit affidavits can explain the purpose of including the income tax returns in the final agreements if those returns were not inserted for the purpose of representing the income and expense of the Faggen Companies. There is no other representation that could have been more important. If, as sworn to by Mr. Kaufman and Mr. Frank, the pro forma statement represented actual income, then why did such sophisticated

executives and lawyers not insist upon or even request a representation to that effect in the final agreement? Or, indeed, in any agreement? If, as sworn to by Mr. Kaufman and Mr. Frank, the pro forma figures represented actual earnings, then why did they not question the accuracy of the income tax statements?

43. Plaintiff's assertion that it relied on the memorandum as a statement of my actual earnings, when it had my actual earnings and knew what they were, would mean that the plaintiff asks this court to believe that the plaintiff, its president, lawyers and accountants were either financially blind or financially illiterate. It would require the court to accept the wholly incredible proposition, in the face of evidence to the contrary, that carefully drawn contracts contained no financial representations.

D. *Plaintiff's Action Was Not Brought In Good Faith*

44. Plaintiff's bad faith is demonstrated by the fact that Frankel defaulted on my notes in May 1971, even before he trumped up this lawsuit and long before he caused the books and records for the period 1965 to 1968 to be reaudited.

REPLY AFFIDAVIT OF HAROLD FAGGEN

45. On May 1, 1971, Titan failed to make the required interest payment. Notice of default was duly served (Exhibit L); Titan had fifteen days in which to cure the default. A special Board meeting was called for May 13. Following that meeting, Kaufman resigned. Frankel had accused both Kaufman and Frank of self-dealing during their administration (Exhibit M). By virtue of this charge, Kaufman later settled his claim for legal fees in the sum of $100,000 by accepting 10,000 shares of unregistered Titan stock with a value of less than $3 a share. In his letter of resignation, he stated his disagreement with Frankel's determination to default on my notes (Exhibit N). Kaufman knew then, although he professes otherwise now, the terms and conditions as well as the background leading to the execution of the contracts herein. In any event, at the next regular Board meeting on May 26, 1971, Frankel reported that the default had been cured. He had changed his mind.

46. Now Frankel seeks to justify this lawsuit by asserting that the poor performance of my companies after acquisition led him to an investigation which uncovered my "fraud" (Frankel affidavit ¶7, p. 5). This is another irrelevant diversion, but here too plaintiff's affidavits

are demonstrably inaccurate. Kaufman's vicious innuendo (¶ 22, p. 19) that the precipitous drop in earnings in 1969 was due perhaps to "adverse factors brewing in 1968" is best answered by his own words in the 1969 Annual Report, dated April 25, 1970 in which he stated:

> "The Harold Faggen Companies, one of the nation's prominent actuarial, consulting and computer service organizations, *continued its profitable growth during 1969*. Headquartered in New York City, the Faggen operation provides computerized pension and welfare funds administration to multi-employer union pension funds providing benefits to over 1,000,000 persons. A comprehensive and highly flexible computer program is being developed which will enable us to provide additional data processing services to present welfare and pension fund clients." (Italics supplied.)

And his statement to the Board of Directors (Exhibit O July 15, 1970)

REPLY AFFIDAVIT OF HAROLD FAGGEN

> "* * * Just prior to his (Kaufman) administration, the Company entered into an acquisition of the Faggen Companies which resulted in $5,500,000 of debt which he did not think the Faggen Companies would be able to make enough profit to pay the interest on. He qualified this statement by stating the Faggen organization's decline in earnings was attributed to decisions to invest in that organization's future in the data processing area."

In the status report to the Board of Directors on the same date, he reported that "all of the acquired companies have been and continue to be profitable". Among those companies was Faggen's.

Kaufman's 1972 memory of 1968 is conveniently oriented to Frankel's purposes. When Kaufman met me on September 6, 1968, his own notes (Kaufman Exhibit 3) reveal -

> "reason to be acquired -- to expand at risk of bigger co. -- no possible reason to risk material expansion. Co. has no organization designed to go after business -- takes just what comes in the door".

Titan's acquisition, therefore, contemplated expansion and it knew the Faggen Company had no organization to go after new business. After acquisition, it pursued the two-fold plan of expansion into the data processing business and increasing the size of the organization. When Kaufman left, Titan under Frankel's management abruptly aborted this effort. Having caused this enormous drain on capital and having withdrawn $2.3 million in cash and securities from the Faggen Companies, Titan now seeks to rescind the contracts and give me back a shell!

47. Frankel was determined to get me to convert my notes to stock so that he could relieve the corporation of its debt and thereby increase the value of his 500,000 share holding in Titan stock. He has not denied the charge in my moving affidavit that, long before he persuaded a lawyer to attack this transaction, he attempted to coerce me into a restructuring of the notes. Examples of this coercion appear in the documents (Exhibit P), some of which are my handwritten notes and some are Board Minutes.

48. Frankel's reckless audacity is amply demonstrated by his willingness to risk acceleration of my notes even before he had a putative basis for a lawsuit. His

wilfullness is demonstrated by his attempts to coerce me into converting my notes into stock. Now in another demonstration of the same reckless and wilfull audacity, he defaults on the notes.

49. The simple fact is there is no merit to the claim. The uncontroverted facts are: Titan and I entered into a contract. The contract contained all the representations and warranties which the parties deemed necessary. The representations and warranties of earnings embodied in the contract were verified by plaintiff's audit. I performed the contract. Titan breached it.

E. *Plaintiff Has Withdrawn From the Faggen Companies $2,300,000*

50. By two deliberately false calculations, plaintiff reduces the amount of marketable securities it withdrew from the Faggen Companies from more than $1,300,000 to $1,075,000 (Hatcher affidavit p. 15).

(a) It totally ignores $175,000 in U.S. Treasury bills transferred to it in January 1969 by the Faggen Companies together with the rest of the securities in the portfolio; the receipt for which is annexed to the moving papers as Exhibit H.

(b) It reduces the value of Titan stock held by the Faggen Companies in unrestricted form by 50% or $57,000 (Hatcher affidavit ¶17, p. 15) because, in Titan's hands, said stock could not be freely sold. It overlooks the elemental fact that, if Titan were to go into the open market to purchase such shares, it would have had to pay the market price and not some lesser price. Once acquired by Titan, its shares became Treasury shares. Titan was the issuer itself and the effect of the acquisition of its shares was to reduce the outstanding shares and thereby increase the value of the outstanding shares. Plaintiff cannot equate those shares with restricted shares held by another stockholder.

51. Plaintiff concedes that it withdrew $935,000 out of the Faggen Companies in the years following the transaction in addition to the more than $1,300,000 in securities which it took shortly after the closing.

52. While artificially decreasing the amounts it took out of the Faggen Companies by some $230,000, plaintiff attempts to artificially increase the amounts paid out by it by asserting that I received $42,440 in cash in 1969, that I have received $185,000 in wages under an employment agreement, and that my wife received $175,000

as the result of her employment relationship. Again, plaintiff demonstrates more facility with numbers than regard for facts.

(a) Contrary to Mr. Hatcher's averment that $42,440 was paid "in cash in 1969" (Hatcher affidavit ¶19), the only monies that were paid to me as down payment was $40.00 not $42,440. The $42,400 was an exchange of notes in connection with the contracts and are attached thereto as Exhibit Q. This was simply a paper transaction.

(b) The amounts paid out to me and to Rose Dogan (whom I married about two years after the transaction) were paid by the Faggen Companies themselves, not by the rest of the Titan Group. Attributing to me Rose Dogan's earnings even before we were married is another example of facility with numbers. However, accepting their position, if these sums are added to the $660,000 in interest, an equivalent amount must also be added to the $2,300,000 thus far actually received by the rest of the Titan Group.

53. To the $2.3 million drawn out by Titan, should be added interest at 7-1/2% for the years during which it had the use of the money or about $540,000 against which interest should be credited to Titan for the

$660,000 paid to me or about $100,000. Titan therefore has received from the Faggen Companies not a net of $1,600,000 but a true net of more than $2,000,000.

F. *The "Clean Hands" Issue*

54. Mr. Frankel seeks to justify the withholding of interest payments on the ground that I lack "clean hands" asserting that I might in the future breach a restrictive covenant in my employment contract with plaintiff.

55. The facts are as follows:

After plaintiff defaulted on the notes, it gave me sixty days' notice of termination of my employment. Mr. Frankel generously suggested that, for some unspecified period at an unspecified rate, I would be retained as a consultant. Contemporaneously with my sixty day notice, Titan installed Theodore Ferrara as president of the Faggen Companies. Ferrara told various clients that I would no longer be connected with the Faggen Companies. Shortly after he had passed along this information, Frankel removed Ferrara and installed another president. The clients, disturbed by this advice, called and I confirmed that I would be leaving. Thereafter, Frankel

recognized the impact on client relationship and rescinded the termination notice.

56. I never solicited the business of any clients for myself or for anyone else. In fact, as Mr. Frankel well knows, I have made a strenuous, and thus far successful, effort to retain the patronage of these clients for the Faggen Companies. That effort was required because of Mr. Frankel's precipitous conduct in attempting to discharge me without determining the effects of the discharge on the business, and in sending telegrams to clients (Exhibit R) attempting to reduce my stature in their eyes. If a loss of business occurs, the fault will be his, not mine.

57. Mr. Frankel, in a deliberate falsehood, states that I "have announced [my] intention to embark on the * * * illegal solicitation of clients" (Frankel affidavit ¶20). I have made no such announcement. I have not solicited them and I have no intention of soliciting the clients of the Faggen Companies.

58. For Mr. Frankel to accuse me of "legerdemain" (affidavit p. 17) because I regard the restrictive covenant as no longer binding, represents a new level of audacity. Here, Titan defaults on its promissory notes,

keeps the cash proceeds it has derived from the Faggen Companies, attempts to fire me from my job and then calmly states that I cannot earn a living in the actuarial field because an employment contract, signed pursuant to acquisition contracts which plaintiff claims are void, contains a restrictive covenant.

59. In view of plaintiff's outrageous conduct, I submit that I am not bound by the covenant. But, unlike the plaintiff, I would seek judicial relief from the covenant.

IV. *The Plaintiff Should Not be Permitted to Withhold Payment of Interest on the Notes*

60. Conceding that it withdrew from the Faggen Companies substantially more than it paid to me, plaintiff, nevertheless, argues that it need not pay interest on the notes because some of the notes are held by holders in due course. With characteristic consistency, the plaintiff does not even propose to pay interest on the notes held by the holders in due course, my former wife who holds as collateral for the payment of alimony $1,500,000 principal amount of promissory notes and the

Franklin National Bank, which holds $1,000,000 in notes as collateral for an obligation of $180,000.

61. I respectfully request that I be granted summary judgment on my counterclaim or, in the alternative, that I be granted an injunction directing the plaintiff to make the interest payments on my notes pending a determination of the lawsuit.

(Sworn to by Harold Faggen, October 16, 1972.)

EXHIBIT J, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.

EXHIBIT "D"

COMPENSATION

| Name | Position | Annual Salary | Weekly Salary | Weekly Inc. Eff. Oct. 1968 |
|---|---|---|---|---|
| rold Faggen | Chairman | 50,000 | | |
| se Dogan | President | 40,000 | | |
| orge Stewart | Secy. Treas. | 26,000 | | |
| eodore Ferrara | Chief Actuary | | 500 | 50.00 |
| l Tabor | Consultant | | 370 | |
| anley Rolnik | Consultant | | 305 | |
| eresa Farkas | Consultant | | 290 | |
| thur Holzman | Consultant | | 285 | |
| bert Stafford | Consultant | | 240 | |
| nold Perlmutter | Consultant | | 210 | |
| lliam Mosley | IBM Supervisor | | 325 | 29.50 |

EXHIBIT K, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.

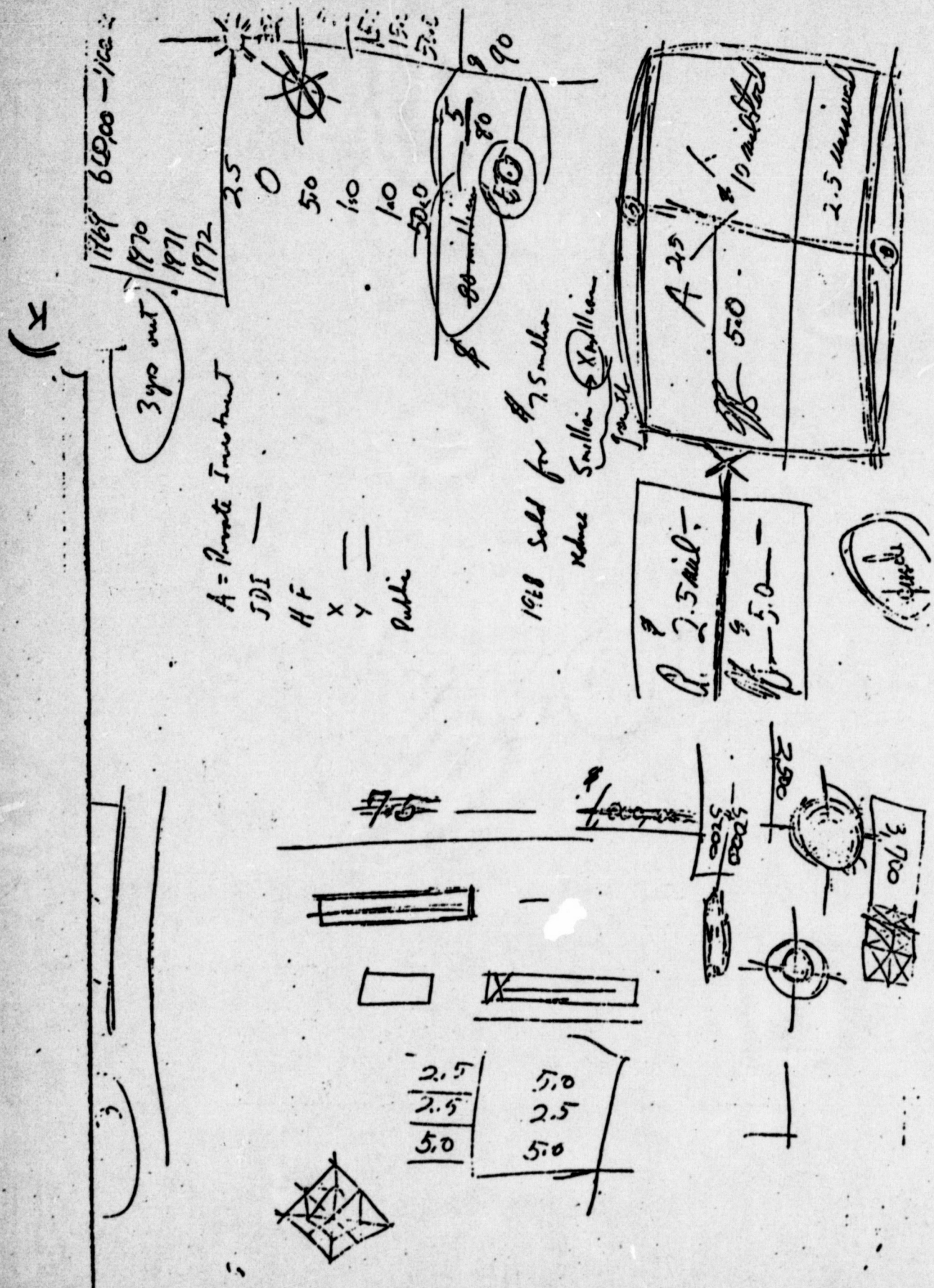


EXHIBIT K, CONTINUED, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.

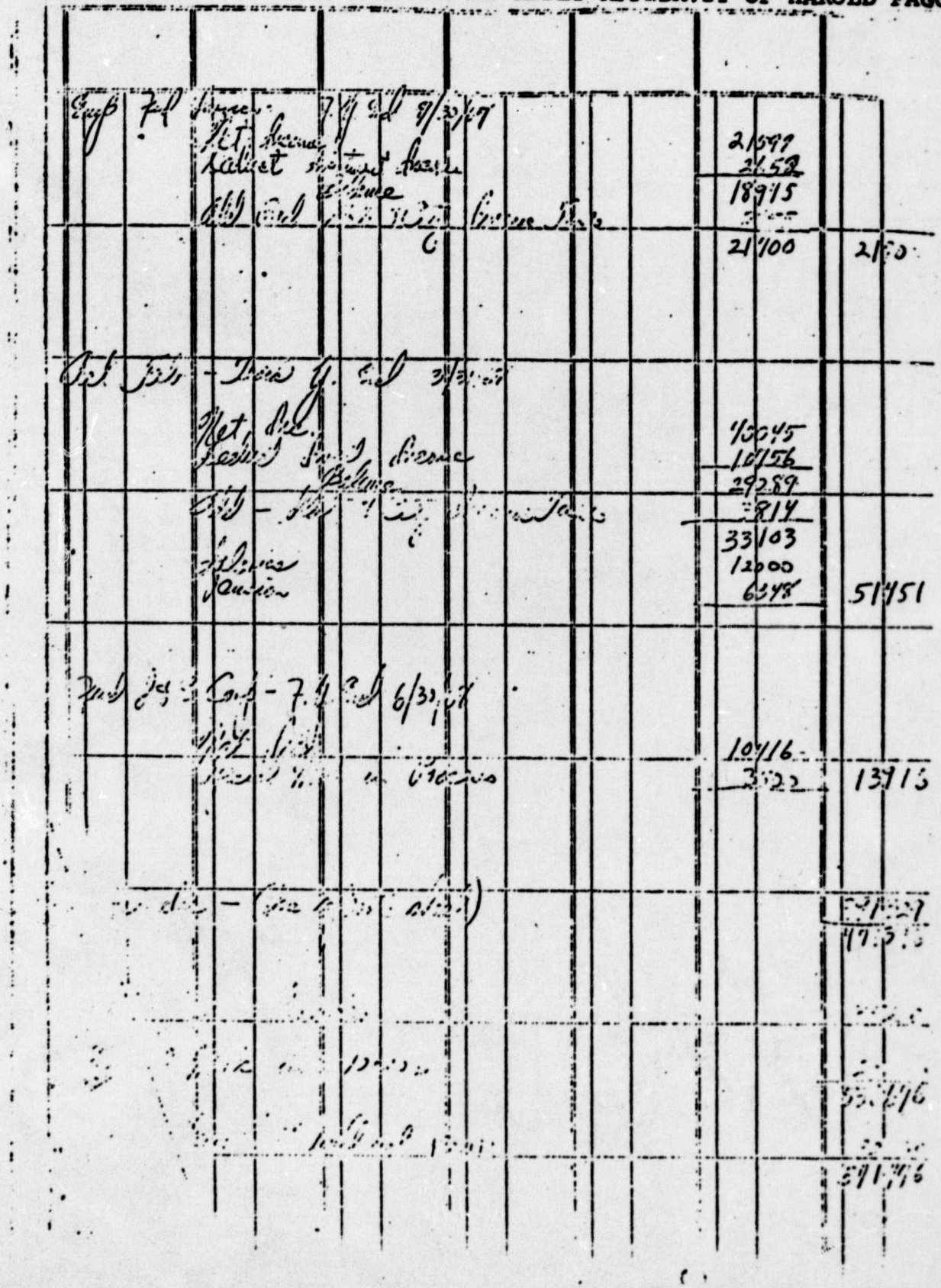
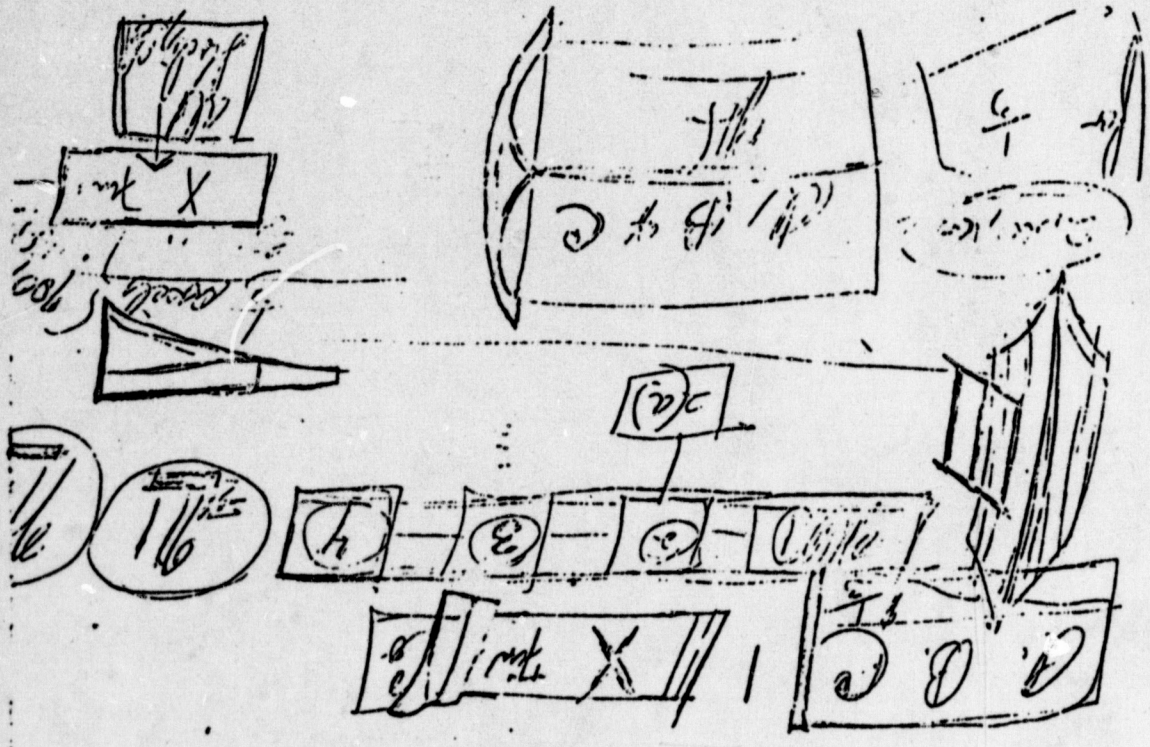


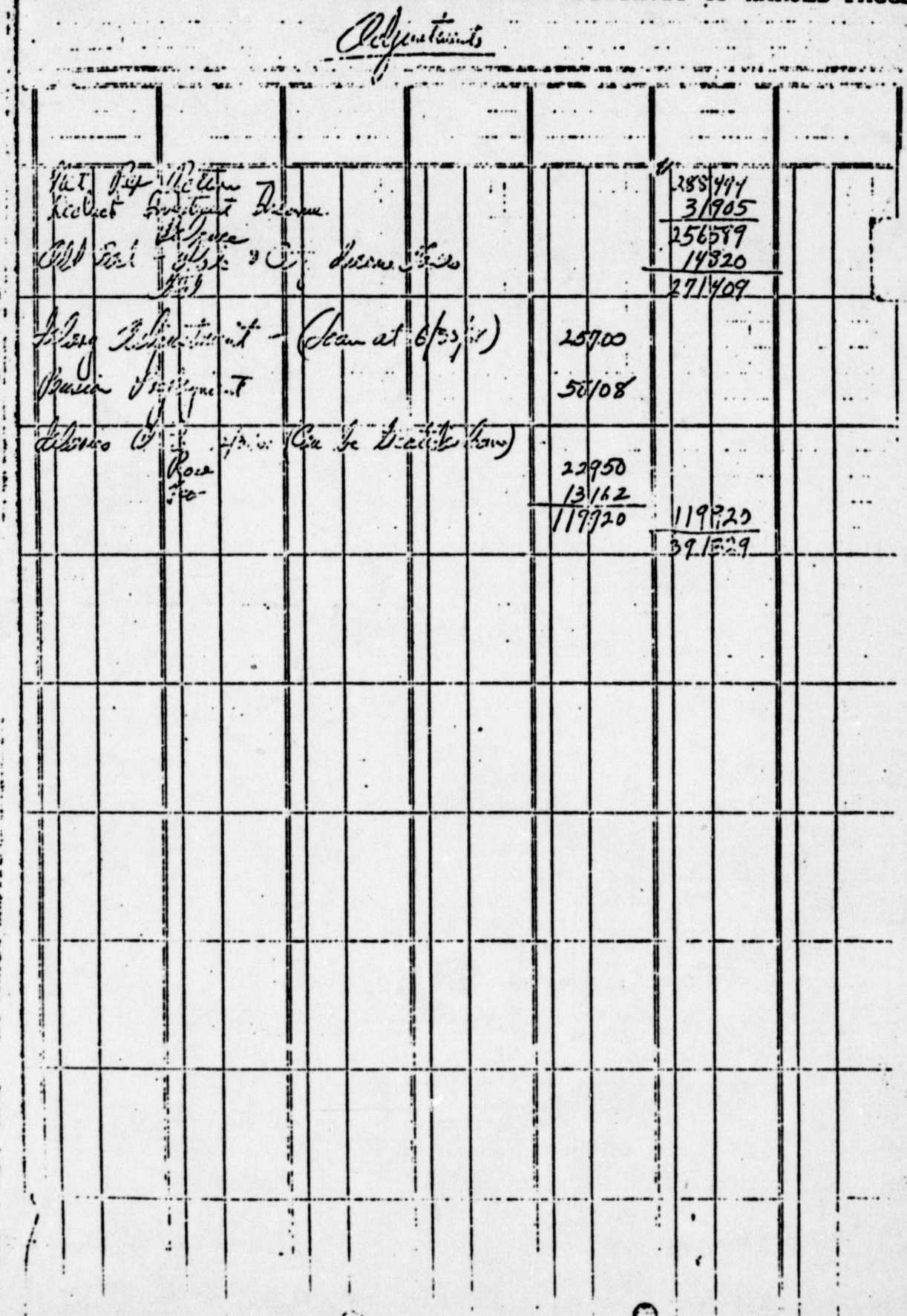
EXHIBIT K, CONTINUED, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



1. (A) contracts to buy 1/3 of Cap. Stock of W.F. interests for $2.5 said

2. W.F.B. agrees to exchange bal. of stock in W.F. Enterprises for stock in X Corp.

EXHIBIT K, CONTINUED, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



# EXHIBIT L, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.

[illegible] FAGGEN ASSOCIATES, INC.
853 BROADWAY
NEW YORK, N. Y. 10003
477-7109

Registered Mail
Return Receipt Requested

May 3, 1971

Titan Group, Inc.
200 Executive Park
Louisville, Kentucky 40207

Gentlemen:

Please take notice that I have not received payment of $106,700, the amount due me as of May 1, 1971 on the four percent Convertible Installment Notes dated October 1, 1968, in the principal amount of $5,441,700 which I hold.

In accordance with the terms of the said Notes, if payment is not received within 15 days after this notice, the entire principal and interest will become due and payable.

Yours very truly,

Harold Faggen

REGISTERED NO. 396806

| | | | |
|---|---|---|---|
| Value $ | | Special Delivery $ | .45 |
| Reg Fee $ | .90 | Return Receipt $ | .15 |
| Handling Charge $ | | Restricted Delivery $ | |
| Postage $ | .10 | AIRMAIL | |

POSTMASTER (By) [illegible]

POSTMARK OF 1971 MAILING OFFICE

FROM Harold Faggen Jr.
853 Broadway
NY 10003

TO Titan Group Inc
200 Executive Park
Louisville KY 40207

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S). REQUIRED FEE(S) PAID.

☐ Show to whom, date and address where delivered ☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below.

REGISTERED NO. 396806
CERTIFIED NO.
INSURED NO.
DATE DELIVERED 5/7

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
DATE DELIVERED

**EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.**

MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS OF TITAN GROUP, INC., held on May 13, 1971 at the offices of Sovereign Construction Co., Ltd., 1325 Inwood Terrace, Fort Lee, New Jersey at 10:30 a.m.

Robert James Frankel, Chairman of the Board of Directors, chaired the meeting and requested Alvin M. Kendis to act as Secretary of the meeting and to record the minutes thereof. The following Directors were present constituting a quorum:

Robert James Frankel
George F. Duthie
Ronald Rosenfeld
Benjamin M. Robinson
Harold Faggen
Aron Drost
Jack L. Farley
Alvin M. Kendis
Edmund M. Kaufman

Also present by invitation were:

Herzl Mendelsohn
Daniel G. Hatcher, Jr.
Ollie H. Windhorst

Alfred M. Frager, while not present when the meeting began, joined the meeting at 12:15 p.m. as hereinafter indicated in these minutes.

The Secretary of the meeting inquired as to whether there was any objection to the timeliness of the Notice of Meeting, it having come to his attention that there may have been a delay in the telegraphic transmission of the Notice to Mr. Kaufman. There was no objection and the Chairman directed that a copy of the Notice of Meeting and the affidavit of the sending thereof, be annexed to and made a part of these minutes.

The Chairman recommended that Daniel G. Hatcher, Jr., Treasurer of the Company, also be designated Financial Vice-President. Upon motion made by Mr. Kendis, seconded by Mr. Duthie and vote being taken, Mr. Hatcher was unanimously elected as Financial Vice-President of the Company in addition to his office as Treasurer.

# EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



The Chairman commented on the fact that the Company had numerous subsidiaries which either had never actually engaged in business or having engaged in business, were no longer active and that certain of the corporation's subsidiaries were no longer active in states where they were presently qualified to do business. As part of a program to eliminate unnecessary corporate existence or qualification, he suggested that the resolutions hereinafter set forth, be considered and adopted. Following a brief discussion, upon motion by Mr. Rosenfeld, seconded by Mr. Duthie and vote being taken, the following resolutions were unanimously adopted:

RESOLVED, that the following corporations, having never engaged in business and having never owned any real property or other substantial assets, be dissolved; that their net assets, if any, be distributed in liquidation to their sole shareholder, Titan Group, Inc., and that the within resolution shall constitute a plan of dissolution and complete liquidation:

| Name of Corporation | State of Incorporation |
|---|---|
| Knollwood Shopping Centers, Inc. | Minnesota |
| T.C.B., Inc. | Wisconsin |
| Monarch Construction Co. | Delaware |
| Futterman Highland Park, Inc. | Delaware |
| Futterman Colonial South, Inc. | New York |
| Air Host Inn, Inc. | Georgia |

RESOLVED FURTHER, that the following corporations be withdrawn from the states set opposite their respective names for lack of activity in such states:

| Name of Corporation | State of Withdrawal |
|---|---|
| Titan Group, Inc. (Delaware) | Illinois<br>Iowa<br>Louisana<br>Maryland<br>Minnesota<br>Wisconsin<br>District of Columbia |
| Titan Motor Inns, Inc. (Delaware) | Arizona<br>Colorado<br>Florida<br>Indiana<br>New Mexico |

# EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



Monarch Construction Co.
(Delaware California

Futterman Hotels Corporation New Mexico

RESOLVED FURTHER, that the Boards of Directors and appropriate officers of the aforementioned corporation shall, and they are hereby authorized to take such action as shall be necessary or appropriate to effectuate the foregoing resolutions.

Following a brief explanation by the Chairman, the following resolutions on motion made by Mr. Rosenfeld, seconded by Mr. Duthie and vote being taken were unanimously adopted:

RESOLVED, that Crest Agency, Inc., Center City Insurance Corp. and H. Apothaker's Son, Inc., each being a Pennsylvania corporation, be merged into Bala Cynwyd Associates, Inc., a Pennsylvania corporation.

RESOLVED FURTHER, that Ready Electric Company, Inc. (Delaware) be dissolved and that its properties comprising the stock of Ready Electric Company, Inc. (Kentucky) be assigned to Titan Group, Inc.

RESOLVED FURTHER, that the Boards of Directors and appropriate officers of the aforementioned corporations, shall, and they are hereby authorized to take such action as shall be necessary or appropriate to effectuate the foregoing resolutions.

The Chairman then commented on the claims for legal fees by Irell & Manella of which Edmund M. Kaufman is a partner. At the invitation of the Chairman, Mr. Kaufman commented upon the position of his firm with respect to the legal fees, alluding specifically to fees which he asserted had been agreed upon and were represented by a promissory note of the Company, as well as subsequently asserted fees for services rendered.

Following Mr. Kaufman's exposition of his firm's position, the Chairman suggested that he might excuse himself from the meeting while the Board discussed the matter.

Mr. Kaufman then left the meeting at approximately

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



11:00 a.m. and the Chairman and the Board proceeded to discuss the question of the Irell & Manella fees which led into a discussion of the other matters, including the Yosemite properties and the circumstances surrounding the acquisition and development thereof. During the course of this discussion Mr. Prager, a Director of the Company, joined the meeting at approximately 12:15 p.m.

At 1:10 p.m., the meeting recessed for lunch and reconvened at 1:35 p.m. with all of the Directors present who had been in attendance earlier, including Mr. Kaufman. The Chairman called the reconvened meeting to order and requested an extension of time of approximately two weeks to respond to Irell & Manella with respect to the Company's position relative to the legal fees claimed by that firm. Mr. Kaufman, after brief consideration, acquiesced in such extension for reply.

The Chairman then reported that he had met earlier with Mr. Faggen and Mr. Robinson regarding the convertible debentures of the Company held by Mr. Faggen and their effect upon earnings and the balance sheet of the Company. He stated that they had met pursuant to his request seeking a common ground to resolve the problem of the burden which these convertible debentures placed upon the Company. Mr. Kaufman requested the Chairman to furnish some information to the Board concerning any proposal made to Mr. Faggen. The Chairman replied that the Company desired to have Mr. Faggen convert to a stockholder's status rather than one of a creditor with some offsetting compensatory restructuring of his transaction with respect to the loss of interest income which would result from such conversion.

The Chairman called upon Mr. Hatcher, who then revieved the Annual Report for 1970 plus the first quarter earnings from operations. He disclosed that first quarter earnings after loss on hotels and motels would be approximately $202,000.00 pre-tax. Following Mr. Hatcher's presentation, the Chairman projected a strong year for the remaining quarters for the construction divisions and also described reduced home office expenses which will be reflected in this year's operations.

A brief discussion followed relating to the forthcoming Annual Meeting of Shareholders, during the course of which it was pointed out that it may be necessary to take steps for the solicitation of proxies in view of the limited time which will elapse from the delivery of the Notice of the Meeting and the date of the meeting, May 26th, 1971. It was noted that a majority of the shares entitled to vote must be represented at the meeting, in person or by proxy, in order to

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



have a quorum for the conduct of business.

The Chairman referred to registration rights relating to the shares of Titan Group, Inc. which certain shareholders held pursuant to acquisition and merger agreements. He reported that several of such shareholders were willing to defer their right to registration as being in the best interests of the Company, provided that such rights shall not be totally waived. He suggested that an agreement might be entered into among such shareholders and the Company to confirm such arrangements. Appropriate documentation of the existing agreements is to be furnished to Counsel for the Company in order that Counsel may make a , recommendation to implement in writing the understanding of such shareholders having registration rights.

The Chairman commented upon the negotiated charges of Ernst & Ernst for the recently completed annual audit and in the course of a general discussion with members of the Board, the problems of the audit, the cost thereof and the steps to be taken to reduce such problems and costs in the future, were reviewed.

Mr. Hatcher then reported that the figures for the quarterly 10-Q report to the S.E.C. had been sent to Counsel this day, and it was anticipated that Counsel would be able to prepare the necessary report for filing by the 15th of this month.

At this point the Board was informed that the Company had received notice of default from Irell & Manella on the promissory note of the Company which it holds and which it claims was validly issued to represent agreed upon fees due that firm for legal services, but that no acceleration of maturity of the remaining principal installments had been declared. It was also reported that the Company had not made the last installment of interest due on the subordinated debentures held by Mr. Faggen and that Mr. Faggen has given written notice of acceleration of maturity of the indebtedness evidenced by such debentures in the event the default in interest is not cured within the allowable grace period. The Chairman indicated that further consideration would promptly be given to the default in payment of interest on such debentures.

The Chairman then briefly commented on actions being taken to seek lines of credit for the Company from six or more banking institutions.

The Chairman remarked upon the stockholders' list which had recently been prepared by Bankers Trust Company

# EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



as of the record date for shareholders entitled to vote at the annual meeting. It was pointed out that the Company had in excess of some 9,000 shareholders and that approximately 1,300,000 shares were held in the names of stock brokers. The Directors then again discussed the necessity of obtaining representation of a majority of the shares authorized to vote at the annual meeting in order to have a quorum present.

The Chairman then briefly reviewed the following:

Progress Report regarding the Yosemite project - the litigation with the contractor, Homer Flint, whose contract had been cancelled and who is claiming damages by way of loss of profits - other cancelled contracts;

The possibility of agreement on price and other terms to dispose of the Company's interest in a joint venture in property on Long Island;

A report that the prospects were very good for growth of Scientific Ecology, Inc., a corporation in which one of the Company's subsidiary's has a minority investment;

A report on progress on formula and methods for allocation of home office over-head to the various operating divisions of the Company;

The need for constant review and consideration of the direction which the Company is to take as well as the need to create cash flow and income for the Company - perhaps as an operating company in some area - in addition to the cash flow and income resulting from operations of the Company's subsidiary;

The potential which could develop for merger into another corporation;

Mr. Rosenfeld then reported on the status of negotiations for sales of property. Among other things, he reported:

The sale of the Arva Motel in Arlington, Virginia was imminent, a contract being

# EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



out for signature and that hopefully, the transaction could be consummated in short order.

That a contract for the sale of Air Host at JFK Airport in New York had been signed during this past week and that a closing could be anticipated within approximately 10 weeks.

That contract negotiations were in process for the sale of the Howard Johnson Motel operation at New Brunswick, New Jersey, and he anticipated a contract would be signed in the near future.

That a draft of agreement for the sale of the Paldor project in West Palm Beach had been mailed to Counsel for the purchaser and final documentation with execution of an agreement of sale was anticipated at an early date.

That underlying documents relating to the proposed leasehold mortgage on the Grosvenor House property in Seattle were being reviewed by Counsel for Connecticut Mutual Life Insurance Company and if found to be to its satisfaction, documentation of the proposed mortgage financing and co-ownership with Connecticut Mutual would be prepared.

That a combination transaction relating to the Golden Triangle Motor Inn in Norfolk, Virginia, the Mid-America Motor Inn in Chicago, and the Trojan Motor Inn in Troy, Ohio, was in negotiation.

The Chairman reported that he had requested Mr. Bergman, as Chairman of the Insurance Division, to ascertain and report on the possible exposure of the Company or its subsidiaries relative to so-called "retrospective" agreements and "claims-handling" agreements and/or under guarantees of performance of any such agreement.

Mr. Kendis then requested the Board to consider a proposed settlement of the so-called Flash Cab cases, pending against Bergman and Lefkov Insurance Agency, Inc. and Messrs. Sam Bergman and William Shapiro, as co-defendants. He related the facts as he understood them, as well as the problems of law

# EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



described by Counsel for the defendants handling the cases in Chicago. It appeared that the claim of upwards of $100,000.00 might be settled in the area of $55,000.00 to $60,000.00 and authorization and instructions was sought by Counsel in Chicago. After discussion, it was agreed that Mr. Bergman be authorized to make the final decision as to whether or not the cases should be settled at a figure not to exceed $60,000.00, or whether liability thereunder should be contested at a trial of the action.

There being no further business to come before the meeting, the same was duly adjourned at 4:00 p.m.

Alvin M. Kendis, Secretary
of the Meeting

ATTEST:

Robert James Frankel, Chairman

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

11/15/68 - 12/3/68 - Cap. accrued profits reduced over $1,000,000 (Commitments only)

11/29/68 - Closings studied.

- Prel. subdivision Rpt. filed in Wm. Sterling Fuller as Owner.

12/2/68 - Fuller started assigning to Gas Co., etc.

12/10 Subdivision turned down by Board of Wadisa Co. - vote of 4 to 4

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

Board Meet — 5/13/71

Re: Ed Kaufman
Mar. '68 — 300,000 Shares sold to Carter, Cefus
⅓ Dell & Merrill — (⅓ of ⅓ to Dell & M.)
⅓ Jay Gould.

Dick Gunther - Double Dec. 6 - Letter of C.D.C.
Eagle Flats on land (now Yosemite
Nat'l Park) Sold Engineering in Oct '68 to set
up 6,000 Acres for Land Develop - Letter called
1200 " .

Nov. 11/6/68 - Meet on a Sat. in off. of Dell & Merrill
(Wolfenden (Sr. Pres.), Kaufman, Jay Gould, Merrill, Dick Gunther.

Gunther - Dell & Merrill go ahead on
terms of deal with Tidal.

11/8/68 - Meeting Dick Craig - Gunther - Jay -
Craig to vote 25% for Gallagher
Hayes - will handle publicity (Contract)
11/13/68 - Started Taking title to Properties in
name of Pacific Lands, Inc. (C Corp.
Org. by Dr. & Mrs.

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

12/5/68 – Memo from Jay to [illegible] Hearing set for Jan. 22nd on Land Development in Calif. – Stating that Yo. Isles Corp. can be acquired.

Memo indicates that project has been under design since early 1968 – Faulkner Memo indicated $5.0 mill. will be required but Titus' maps cash outlay would be $1.8 million.

12/5/68 – Jay represented as all belonging to Jay Titus. As a matter of fact Faulkner had started transfer to Yo. Isles.

On 11/20/68 – Jay was Pres. Yo. Isles. Jay & Ed were Directors of Yo. Isles.

12/2/68 – Another Land Offer transferred by Titus to Yo. Isles.

Ltr. copy to Jay T. was addressed to him as Pres. of Yo. Isles, Inc., not as Pres. of Titus.

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

~~12/1/68~~

~~Minutes of Meeting~~

12/10/68 — 9:00 P.M. — Bd. of Mdgrs. Cy. met
Off. for reasons which Lipp. et al
the Offices of Title, Title Bldg. as
Owners Off. Denied.

12/12/68 — Telem Bd. Mgrs.
John Pierce } become officers.
& Robt Brink } of Corp.—

4 Directors absent at this meeting
H. F., Weinstein, Kaufmann, Pierce.

Loan to N.C.D.C. — 1.5 mil. approved by Bd.
Pierce moved & H. F. seconded.

H. F. moved to dispense this Board Resolutions.

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

3/21/68 — Acquired Jefferson Sleeper
April 68 — Jerry became Pres.
1965 Dec — Ed. became Dir.
Feb. 12, 1969 — Ed became V-Pt. in charge of acquisitions

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

5/13/71 — Ed. K signed ltr.

5/27 — H. need copies weeks before we can come to decision.

Ed. — "I see no question about mailing payments on notes. I am willing to submit a to other fees"

# EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

MINUTES OF THE ANNUAL MEETING OF
THE BOARD OF DIRECTORS OF
TITAN GROUP, INC.
held on May 26th, 1971 at the
Holiday Inn, Zorn Avenue,
Louisville, Kentucky at
11:00 a.m.

The meeting was called to order following the annual meeting of shareholders of the corporation at which Directors were elected to serve for the coming year and until their successors are duly elected and qualified. Robert James Frankel, Chairman of the Board of Directors, chaired the meeting and requested Alvin M. Kendis to serve as Secretary of the meeting and to record the minutes thereof. All of the Directors were present, namely:

Robert James Frankel
George F. Duthie
Ronald Rosenfeld
Benjamin M. Robinson
Harold Faggen
Aron Drost
Jack L. Farley
Herzl Mendelsohn
Alvin M. Kendis

Also present by invitation were:

Ollie Windhorst, Sr.
Pat King
Leonard Friedman
Daniel G. Hatcher, Jr.

The Secretary of the meeting noted that no notice of this meeting was required pursuant to the provisions of the by-laws of the corporation, a quorum being present and the meeting being held immediately after the annual meeting of the shareholders.

Copies of the minutes of the meeting of the Board of Directors held on May 13, 1971, were distributed to all of the Directors.

The Chairman called for the election of officers as the first order of business. The following persons were then nominated for election to the offices set opposite their

# EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



respective names:

| | |
|---|---|
| Chairman | Robert James Frankel |
| Vice-Chairman | Benjamin M. Robinson |
| President | George F. Duthie |
| Vice-President | Ronald Rosenfeld |
| Financial Vice-President | Daniel G. Hatcher, Jr. |
| Treasurer | Daniel G. Hatcher, Jr. |
| Secretary | Ronald Rosenfeld |
| Assistant Secretary | Jack L. Farley |
| Assistant Secretary | Maurice L. Miller, Jr. |

There were no further nominations and upon vote being taken, the foregoing persons were unanimously elected to the offices set opposite their respective names to serve until the next annual meeting of Directors and until their successors are duly elected and qualified.

Following the election of the officers, Robert J. Frankel, George F. Duthie and Ronald Rosenfeld were, upon motion made by Benjamin M. Robinson, seconded by Alvin M. Kendis, and vote being taken, unanimously elected to serve as the Executive Committee of the Board of Directors of the corporation until the next annual meeting of Directors and until their successors are duly elected and qualified.

The Chairman reported that he had received a resignation from Edmund M. Kaufman as a Director of the corporation on May 24, 1971. Mr. Kaufman was not a nominee for re-election as a Director and no action was required with respect to his resignation. A discussion followed relative to the relationship of various persons with respect to the Yosemite project and the possibility of conflicts of interest. The Chairman pointed out that the two-week period which the company had requested for the purpose of responding to Irell & Manella concerning the legal fees claimed by that firm would expire in two or three days. He then highlighted certain informal opinions which he had solicited from attorneys relative to possible conflict of interest and non-disclosure of material facts by Edmund M. Kaufman and his law firm. After extended discussion, the Board authorized Robert James Frankel and Alvin M. Kendis to discuss with Edmund M. Kaufman and a senior partner of his firm, the facts which indicated such possible conflict of interest and failure to disclose information which would have materially influenced the Board of Directors in its decision to go forward with the Yosemite project. The Board unanimously indicated that in the absence of any additional information which would cast doubt upon the facts which had

## EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



been brought to its attention, it believed there to be reasonable grounds for an action to be brought against Mr. Kaufman and his firm relative to the Yosemite transaction, the losses incurred by the corporation therein and any undisclosed profits of said law firm arising from said transaction. The Board then unanimously authorized Messrs. Frankel & Kendis to enter into bonafide negotiations with the firm of Irell & Manella, if it should indicate any desire to do so and thereupon to report back to the Board. The Board further unanimously authorized the Chairman to cause an action to be filed in the event no further information was adduced which would cast doubt upon the facts presently available to the corporation if said law firm should refuse to conduct any reasonable negotiations or discussions.

The Chairman advised the Board that the current interest had been paid upon the convertible debentures held by Mr. Faggen and that further consultation with Mr. Faggen and his Counsel would ensue seeking some restructuring of Mr. Faggen's position.

Attention was called to the fact that Mr. Anthony Frank had notified the corporation that there was an error in the Proxy Statement which reflected that his shares had been repurchased by the corporation for the sum of $75,000.00 in cash plus the cancellation of his promissory note to the company, whereas, in fact, the $75,000.00 was represented by a promissory note of the corporation of which the sum of $60,000.00 had been paid in cash to this date and upon which a balance of $15,000.00 remained. Mr. Kendis stated that he would cause a call to be placed to the S.E.C. in order to ascertain what steps may be necessitated to correct the record with respect to this inadvertent error in the Proxy Statement, although he did not feel the error resulted in any material misrepresentation or non-disclosure.

The Board discussed the obligatory registration requirements in several of the contracts relating to acquisitions which had been consummated in prior years. Notices had been received from several shareholders demanding that the corporation proceed with registration of shares as required under their respective contracts. The Chairman explained that a proposed letter agreement had been prepared by house counsel for the purpose of extending, for one year, mandatory registration requirements which had already become effective by reason of the lapse of time. Such an agreement would, of course, have to be executed by all parties holding presently effective registration rights in order to accomplish the deferment. Counsel for

# EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



certain of the parties was presently examining the proposed agreement and the hope was expressed that satisfactory arrangements would soon be concluded. The Board recognized the desirability of the described extension and authorized the corporation's participation in such an agreement.

The Chairman referred to a recommendation from the Executive Committee that a professional public relations firm be engaged on behalf of the corporation. The Committee had considered three firms and recommended that the corporation engage the services of Cherenson, Carroll & Associates, a New York City concern, for a 90-day trial period at a retainer of $1,500.00 per month plus customary expenses and advances. The Board unanimously approved the appointment of Cherenson, Carroll & Associates for such purpose and for such period.

The status of discussions with Ernst & Ernst relative to its statement for services for the 1970 audit was described by the Chairman. He also recited that negotiations were being conducted for a fixed fee for the 1971 year-end audit. After discussion, the Board unanimously authorized the Chairman and President to negotiate and settle with Ernst & Ernst, the 1970 audit charge and a maximum 1971 audit fee on such terms as they may deem in their discretion to be reasonable and appropriate.

The Chairman called upon Ronald Rosenfeld to give a status report on sales of hotels, motels and other real estate previously authorized. Among other things, Mr. Rosenfeld reported:

> The sale of the Arva Motel was closed on May 20th, 1971 on the terms previously described and authorized;
>
> A sale of the Howard Johnson Motel had been negotiated and was in the hands of Counsel for the preparation of necessary contracts;
>
> A contract had been signed for the sale of the Air Host J.F.K. Motel on terms previously authorized and it was anticipated that a closing would take place in approximately 6 weeks, dependent upon the issuance of consent to transfer the liquor license at that location;
>
> A contract for the sale of the Fulder

# EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



property in West Palm Beach, Florida, had been forwarded for execution by the purchaser;

Connecticut Mutual Life Insurance Company had reported its approval of the leasehold of the Grosvenor House for mortgage purposes; that Counsel for Connecticut Mutual was in the process of preparing the mortgage and other financing documents and Counsel for this corporation was in the process of preparing the agreement between Connecticut Mutual and this corporation relative to the conveyance of an undivided one-half interest in the leasehold estate to Connecticut Mutual and the organization of a common venture for such ownership and management;

The Chairman and Mr. Hatcher commented on the steps which were being taken for provision of a cash-flow to this corporation by way of allocation of corporate costs to the separate divisions and requirement of deposit of excess funds in a central Titan Group, Inc. account, which latter would offer many benefits, including leverage in negotiating with banks for lines of credit and the better use of funds on an inter-divisional basis to meet fluctuating and cyclical needs. The Board discussed the significance of these proposed moves and the means of implementing them. Both the Chairman and Mr. Hatcher responded at length to the inquiries which were made from Board members and guests who were responsible for or concerned directly with divisional operations and management.

Mr. Mendelsohn then reported that with respect to the proposed settlement of the so-called "Flash Cab" lawsuits, negotiations were presently in the neighborhood of $57,000.00 to $58,000.00, that efforts were being made to further reduce the settlement amount, if possible, and that he anticipated the cases would be disposed of within the next 10 days to two weeks with full releases of all claims, past, present or future, by the plaintiffs in these cases.

The Chairman reported that each division had been requested for information as to what might be expected for the second, third and fourth quarter results for the current year. He projected the construction division would have a substantial profit potentional during the next two quarters and that although the corporation was going through a period

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



of consolidation, it should, nevertheless, seek to use to full advantage, the asset power of the corporation and its profit potential. He recommended that the corporation be alert to opportunities of desirable up-hill mergers or of advantageous acquisitions.

A brief general discussion then followed, after which, there being no further business to come before the meeting, the same was duly adjourned at 1:25 p.m.

Alvin M. Kendis, Secretary
of the meeting

ATTEST:

Robert James Frankel, Chairman

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

SHEPPARD, MULLIN, RICHTER & HAMPTON
ATTORNEYS AT LAW
458 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013
(213) 620-1780
CABLE SHEPLAW

September 9, 1971

4270-T

Mr. Robert J. Frankel
Chairman of the Board
Titan Group, Inc.
1325 Inwood Terrace
Fort Lee, New Jersey 07024

Dear Mr. Frankel:

You have asked that we supplement our letter of August 31, 1971, more specifically, after again reviewing the folders that you have prepared in connection with the dispute between Titan Group, Inc., and the Los Angeles law firm of Irell & Manella, and that this supplement contain specific recommendations with respect to your course of action.

According to the documents, Edmund M. Kaufman served as Chief Executive Officer of your company at the same time that his law firm, of which he was a partner, Irell & Manella, received several hundreds of thousands of dollars of legal fees from your company over a period of approximately two years. Your company is alleged to still owe Irell & Manella in excess of $100,000 in legal fees for services rendered during this period.

Based upon the folders that you have prepared, the charges for legal fees seem to us to be excessive and not properly documented. They are subject to scrutiny because of Mr. Kaufman's relationship with his law firm and his employer, and it would be our recommendation that you advise Irell & Manella that it is your intention not to honor their demands for the money allegedly owed them. The grounds would be that the legal services were improperly incurred, the charges were excessive and not approved by the Board of Directors and, further, that the extent of services rendered is not properly documented.

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

SHEPPARD, MULLIN, RICHTER & HAMPTON

Mr. Robert J. Frankel
September 9, 1971

Page Two

If Irell & Manella elects to bring a lawsuit against your company in California, assuming that our litigation department is then capable of taking on a new matter, we would be willing to represent your company in the matter, and if not, we will be happy to obtain competent counsel for you.

If you wish, there is an arbitration committee established by the Los Angeles County Bar Association, which might be willing to assume jurisdiction of the dispute. I would be pleased to explore this with you further at your convenience.

With respect to the Northern California land transaction, we are still unable to express an opinion or recommendation with respect to the specific course of action that you should follow. If you do become involved with Irell & Manella in litigation concerning your fees, you may wish to raise their role in the acquisition of the land in the same action.

As I have indicated to you, corporate mismanagement is not a particularly easy thing to prove, but it does seem to us that because of the facts that were apparently concealed from at least some of the directors, it may be that you should file an action against the prior management and directors of the corporation, alleging a breach of their fiduciary duty to their stockholders in connection with their activities in that transaction.

As I have indicated to you before, we would be doing you a disservice to take on this type of litigation at this time, because our litigation people are simply too busy to do it justice.

I trust that this supplemental letter will be of help to you.

Sincerely yours,

Thomas R. Sheppard

TRS:sy

for SHEPPARD, MULLIN, RICHTER & HAMPTON

EXHIBIT M, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



claims for the year 1970. Mr. Rosenfeld voted against the motion and Mr. Frankel abstained from voting on the motion; all other Directors voted in favor.

The Chairman reviewed his investigation with respect to the position of Irell & Manella in the Yosemite transaction as well as the claim by that firm for unpaid legal services represented in part by a promissory note of this company held by it. The Chairman posed a series of possible moves and requested consideration by the Board on each. A discussion followed after which, pursuant to separate motions and separate votes, it was decided:

If the Company is sued by Irell & Manella the Company will defend.

If sued by Irell & Manella, the Company will defend and countersue.

The Company will not initiate action against Irell & Manella.

The vote with respect to each of the foregoing was unanimous except as to the vote with respect to initiating action against Irell & Manella, where the Chairman recorded his vote in favor of initiating such action, all other Directors voting in the negative. Mr. Kendis was requested to notify Edmund Kaufman of the firm of Irell & Manella of the intention of the Company not to honor its claim for additional attorneys fees. He was also requested to suggest that the Chairman might be willing to sit down with Mr. Kaufman to consider the possibility of settlement out of the claims of the law firm.

In the course of the discussion relating to the Irell & Manella matter, a question was raised concerning the possible obligation of the Directors to initiate action. Mr. Robinson requested Mr. Kendis to comment as Counsel for the Company. Mr. Kendis stated that he did not believe it to be the obligation of the Directors to act unless there were reasonable grounds for the initiation of litigation and a reasonable prospect of a successful conclusion to the litigation. He expressed his opinion that in view of all of the information presently available relating to the services rendered by Irell & Manella, it would be in the best interests of the Company if some settlement were achieved.

Mr. Kendis reported to the Board that certain pending litigation against the Company by Joseph Bonaparth, a former

EXHIBIT N, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.

LAW OFFICES

IRELL & MANELLA

SUITE 900 GATEWAY EAST BUILDING

CENTURY CITY

LOS ANGELES, CALIFORNIA 90067

(213) 277-1010 AND 879-2000

CABLE ADDRESS: IRELLA

OF COUNSEL

LOUIS H. BROWN

LAWRENCE N. STONE

BERGEN & IRELL 1941-1948

EUGENE H. BERGEN 1892-1944

May 13, 1971

Mr. Robert J. Frankel
Chairman of the Board
Titan Group, Inc.
c/o Sovereign Construction Company
1325 Inwood Terrace
Fort Lee, New Jersey 07024

Dear Bob:

After giving the matter much consideration, I feel that it is advisable for me to resign as a member of the Board of Directors of Titan Group effective immediately. Accordingly, this letter shall constitute my resignation.

I hope you will appreciate that my action in resigning is not due to any pique or anger on my part. Inasmuch as my membership on the Board was to terminate within the next two weeks, I would normally not have taken such action. However, I have been concerned about the lack of communication between management and myself, leaving me with the feeling of being completely uninformed. Further, I was surprised at the sudden and abrupt calling of a Board meeting last week and particularly at what would appear to be a decision made with respect to the convertible subordinated debentures with which I was in serious disagreement. Finally, I believe that resolution of any matters which involve me personally can best be accomplished under circumstances where I am not a Board member.

I can assure you and all of the remaining members of the Board that my absence from Titan's Board of Directors will in no way affect my willingness to cooperate both by giving information and by performing whatever additional

**EXHIBIT N, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN**



services may reasonably be requested. I hope to retain my friendship with many of the principals of Titan (including yourself) and I certainly wish you and all of the Board members the best of luck in your striving to make Titan a profitable and successful enterprise.

Cordially,

Edmund M. Kaufman
of IRELL & MANELLA

EMK:yk

cc: Mr. George F. Duthie
Mr. Ronald Rosenfeld
Mr. Aron Drost
Alvin H. Kendis, Esq.
Mr. Harold Faggen
Benjamin H. Robinson, Esq.
Mr. Samuel H. Bergman
Mr. Alfred H. Prager
Mr. Jack L. Farley

**EXHIBIT O, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.**

DRAFT

Continuation of the Annual Meeting of the Board of Directors held at the office of the corporation, 529 Fifth Avenue, New York, N.Y., Wednesday, July 15, 1970, at 2:30 P.M.

PRESENT:
Samuel N. Bergman
A. Robert Doll
Aron Drost
George F. Duthie
Harold Faggen
Alfred M. Frager
Robert J. Frankel
Edmund M. Kaufman
Benjamin M. Robinson
Ronald Rosenfeld
John C. Spence
Benjamin Weinstein

Also present were Jack L. Farley, John J.Cost, and Lester A. Kaufman.

Mr. Edmund Kaufman acted as Chairman of the meeting and Lester Kaufman as Secretary thereof.

The Secretary presented to the meeting a copy of the notice thereof that had been sent through the mails, or delivered by hand, to these directors together with an affidavit relating thereto. The Chairman directed that said notice and affidavit be filed with the minutes of the meeting.

Mr. Kaufman convened the meeting and distributed a memo entitled "Status Report for Presentation to Board Meeting, July 15, 1970" (copy attached). This report was submitted to the Board by its officers, Edmund M. Kaufman, Chairman, John C. Spence, President, Benjamin Weinstein, Executive Vice President-Finance/Operations, and Lester A. Kaufman, Vice President and Secretary.

The Chairman stated that it was not necessary to read the memo at this sitting, that he would talk on its contents, and commenced to focus on the historical aspects of the organization over the past three years, outlining the following areas: abandonment of properties, in specific, Marott Hotel, Colonial Motor Inn, and the Parliament House, which he indicated that $4/5,000,000 had been spent on these properties over the past three years and that these properties

**EXHIBIT O, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN**

subsequently had to be abandoned.

The Chairman highlighted the company's involvement in the auto rental business and the underwriting insurance business (Compass Insurance) in 1967 which, combined, produced a net loss of approximately $1,000,000 in cash. He then indicated that just prior to his administration, the company entered into an acquisition of the Faggen companies which resulted in $5,500,000 of debt which he did not think the Faggen Companies would be able to make enough profit to pay the interest on. He qualified this statement by stating that the Faggen organizations' decline in earnings was attributed to decisions to invest in that organization's future in the data processing area.

The Chairman then traced his own history in the organization stating that he believed that the role that was designated for him, both prior to and after his chairmanship, was in the acquisition area. He then evaluated the acquisitions that have been made since June, 1969. He considered all of them in a favorable light, with the exception of the Harvey Insurance Agency. He indicated that the earnings of Titan for the calendar year 1970 should be better than those for 1969, even excluding Yosemite, and he felt that the calendar year 1971 would be even better. He then outlined the current cash crisis that the corporation was in, indicating that the bulk of the cash that the corporation has generated in the previous 18 months has been invested in four land development programs, Long Island, Yosemite, Shasta and West Palm Beach. He further stated that each of these programs has a profit potential. He also outlined the areas where the corporation might be able to receive additional financing:

1) The sale of the Golden Triangle, which would generate $2,500,000,

2) The sale of the Blue Cross, which would generate $670,000,

3) The sale of the Grosvenor House, which would generate $610,000,

**EXHIBIT O, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN**
TITAN GROUP, INC.

Status Report for Presentation to
Board Meeting, July 15, 1970

In light of the critical state of facts existing at the current time and in order better to inform members of the Board of Directors as to management's thinking and proposals, management hereby submits the following:

1. History and current position. The company historically has been primarily an owner-operator of developed income-producing properties as well as an operator of an insurance agency and brokerage business. The company suffered significant financial costs and losses in connection with certain of its properties (i.e., Marott Hotel in Indianapolis, the Colonial Motor Inn in Binghamton, Parliament Inn in Orlando), abortive ventures in steel importing, car rental and insurance underwriting. Commencing in the latter part of 1968, the company expanded its operations by acquisition of a group of actuarial companies, several insurance agencies, and a number of housing and construction companies. During the last six months of 1968, the company also expanded its previously small involvement in land development by making investments in several additional development projects (Madera County-Yosemite, Shasta

**EXHIBIT O, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN**

County, West Palm Beach-Shadow Lakes). All of the acquisitions, with the exception of the actuarial companies, were accomplished by the issuance of common stock.

All of the acquired companies have been and continue to be profitable with the exception of the Harvey Insurance Agency, which, together with Titan's previously existing Los Angeles agency, has been suffering small losses. Many of the previously owned real properties have been disposed of and the balance are generally earning a substantial amount and are throwing off a cash flow sufficient to amortize all mortgage indebtedness and to provide some cash to cover corporate overhead.

Titan's current investment primarily in four development projects total approximately $6 million, as follows:

| | |
|---|---|
| Yosemite | $3,000,000 |
| Shasta | 800,000 |
| Shadow Lakes | 1,200,000 |
| Long Island-Farber | 1,000,000 |

Of the above developments, the oldest is the Long Island-Farber joint venture and represents an investment in to be developed residential and commercial properties. The only development currently producting any income or revenues is the 12,000 acre

development in Shasta County. Sales have been exceedingly slow and down payments are merely sufficient to cover sales costs. Accordingly, there has been no cash flow from this project although approximately 20% to 25% of the total project has been sold. The subdivision map regarding the Yosemite project has been filed and recorded and the company is currently awaiting the PUC and the Division of Real Estate reports so as to enable the commencement of sales. The Shadow Lakes development is also apparently on the verge of the commencement of sales subject to final agreement with the County of West Palm Beach regarding the water system and the obtaining of a certificate of occupancy for some portion of the units.

In summary, the company is in the position of having generally uniformly profitable operations but is in a poor cash position almost entirely as a result of the continued capital investment in the four development projects discussed above.

It is the belief of management that the long range future of Titan lies in the direction of expansion and growth in the housing and construction fields and the financial services field centering around its insurance agencies and actuarial companies. Management believes that the company does not now have the financial

resources to engage in extensive land developments comparable to the Yosemite project.

2. Proposals and current activities implementing same. Titan's greatest need is for an immediate influx of cash to enable it to resolve its intermediate and long-range problems on a reasonable basis and without the necessity of subjecting itself to significant sacrifice of future potential. Management has been attempting to resolve its immediate liquidity problems through various routes:

(a) Banking. Primarily through the efforts of divisional operational people, lines have been established for local operations at banks in Louisville and New Jersey. In the past few months substantial loans have been obtained and/or renewed with The Chase Manhattan Bank, Franklin National Bank and the Exchange National Bank. Recently tentative additional renewals have been obtained with the possibility of additional financing on a secured basis still open. Management has attempted to secure a substantial open bank line with various banks including those mentioned but with particular reference to the Bank of America and the Union Bank, both in Los Angeles. Discussions with the Bank of America are still continuing.

(b) Disposition of owned developed properties. A program to dispose of developed properties was instituted

EXHIBIT O, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

approximately two years ago. During the past year, the market for income producing real properties has considerably softened. The limited availability and high cost of money has made it extremely difficult to dispose of properties at other than distressed terms. The company has been under contract to dispose of three of its hotels (Golden Triangle, Key to American and Riverside) to Norman Groh since approximately November of 1969. Such sale, if consummated , would have resulted in approximately $2.5-3 million in cash being received by the company. Mr. Groh has had significant problems both in obtaining Holiday Inn approval and the necessary financing. We have recently been informed that such problems have been surmounted and a closing for at least the Golden Triangle is currently scheduled for the week of July 20. In addition, management currently believes that the sale of the Blue Cross Building ( to generate in excess of $650,000) will be consummated by the end of July. Finally, serious negotiations are under way with respect to the Grosvenor House in Seattle. None of the foregoing is assured although management believes that there is a reasonably high degree of probability, at least as to Golden Triangle, that one or more sales will occur. In addition, management has been

engaging in negotiations with a large variety of potential buyers for virtually all of the owned properties including discussions with Mr. Louis Tickel in Denver and, through an intermediary, with the Manger Hotel chain. Management has also discussed the disposition of part or all of the Long Island development project to Shapell Industries.

In summary, it is fair to say that disposition of owned real properties at a reasonable price would be the most advantageous method of meeting Titan's immediate cash problems at the least sacrifice and with essentially little or no adverse effect on Titan's future potential.

(c) Disposition of Yosemite project. Management has made a continuous effort to attempt to finance or dispose of the Yosemite project under circumstances which would be reasonable if not extremely advantageous to the company. It has been management's continuing belief that such disposition was not feasible until all final governmental approvals are received and the project was potentially in a sales posture. In any event, given the imminence of such circumstances it has appeared advisable to proceed on such assumption. Serious discussions and negotiations in varying degrees have already commenced with a large number of potential joint venturers and/or purchasers including American

Standard, Dart Industries, Occidental Petroleum, GAC, Cassuba, International Paper and Forest Lawn. Management believes that within the immediate future, such negotiations will culminate in a transaction which will, at the least, relieve the company of the burden of future expenditures in the Yosemite project and will hopefully return to the company a portion, if not all, of the prior expenditures heretofore made. Management believes that such a course of action with regard to Yosemite is appropriate despite its evaluation that the Yosemite project may well turn out to be an outstanding one from an overall profit viewpoint.

(d) Private and public sources of capital. Management has been engaged in a continuing attempt to search out and obtain substantial capital from every conceivable source. Negotiations have been undertaken, to some extent with the help of investment bankers, with a variety of sources, looking toward obtaining long term money in the form of debt, equity or some combination thereof. Among the persons or entities with whom meaningful conversations have been held and are continuing are the following: Edward McDonald

(Denver business man), Herbert Crane (President, Continental Finance), Ford Motor Credit Corporation, Allstate Insurance, and Edward Scarff (San Francisco entrepreneur). Management is currently utilizing the services of the investment banking firms of Dean Witter, Newburger Loeb, Hornblower & Weeks-Hemphill, Noyes and DuPont, Glore Forgan in attempts to obtain additional capital from institutional or venture capital sources. In addition, management has been in contact with several REIT's and with several sources for European and other foreign funds. Finally, management is currently considering, with the help of Dean Witter, the advisability of attempting to obtain funds through a public financing (probably convertible debt) in the immediate future.

(e) Acquisition of capital by mergers.

Management has been considering the possibility and advisability of obtaining substantial capital through the vehicle of a merger with a smaller but capital-rich company as well as the possibility of a merger with a much larger company. Discussions have been had during the past several months with Shapell Industries, Shelter Resources (formerly Electronics Capital Corporation), General Portland Cement, Dart Industries, Occidental Petroleum, and IBA. Many of these discussions have proceeded primarily on the level of

obtaining financing through a joint venture or other arrangement with respect to particular projects (such as Yosemite). Management does not believe that this possible solution is likely except on a longer term basis and, in any event, except under extraordinary circumstances, would be one of the less desirable alternatives.

(f) General internal problems. Management is cognizant of the fact that it is the view of a concensus of the Board of Directors that additional top level personnel are desirable. Discussions have ensued with regard to employing executive talent for the company generally and with specific reference to the insurance agency operations, the actuarial companies and the construction and housing group. Serious discussions are currently under way with Alan Borstein (of Boise Cascade) and Frank Zappala. An executive search organization has been employed for the purpose of obtaining personnel for the insurance and actuarial operations.

Some attention has been devoted towards the creation of operations for the construction and housing group in particular. One or more meetings have been held with such persons as Jan Dykman of McClaughry Associates and Jim Duffy in Louisville with regard to FHA and other government subsidized and/or sponsored housing.

There are, of course, a variety of internal

problems which are of less significance than those discussed above but which nevertheless need management's attention.

3. Summary and conclusion. Management believes that its program of attempting to generate short term cash by the disposition of real properties and/or the obtaining of loans or equity from the sources discussed above, and the resolution of the cash flow problems by appropriate arrangements with regard to Yosemite, Long Island and Shadow Lakes is reasonable. A favorable resolution of Titan's cash and management problems can be attained only if maximum management time is available for attending to solutions and if maximum cooperation from all divisional management is obtained. It is essential, for example, that reasonable financial controls and flow of information be accomplished immediately. It is impossible to negotiate transactions involving large sums of money without reasonably precise information in the hands of corporate management. It is impossible to maintain flexibility, much less viability, if internal sources of capital are not centrally controlled. Future activities must proceed on the basis of mutual confidence and trust. Management hereby re-expresses and emphasizes its willingness to commit all of its time and energy to the resolution

of the problems and to the realization of what we believe to be Titan's inherent potential.

Respectfully submitted,

Edmund M. Kaufman, Chairman

John C. Spence, President

Benjamin Weinstein, Executive Vice President - Finance-Operations

Lester A. Kaufman, Vice President and Secretary

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.

WU Telegram

NK223 (38)CTA311
CT LY004 LVZ1 LVZ1 FC PD LOUISVILLE KY 10 NFT 1971 MAY 10 PM 11 26
HAROLD FAGGEN 477-5106
HAROLD FAGGEN ASSO 853 BROADWAY NYK
PLEASE TAKE NOTICE PURSUANT TO CALL OF THE PRESIDENT THAT A SPECIAL MEETING OF THE BOARD OF DIRECTORS OF TITAN GROUP INC. WILL BE HELD ON THURSDAY MAY 13TH 1971 AT 10 AM EDST AT THE OFFICE OF SOVEREIGN CONSTRUCTION CO LTD 1325 INWOOD TERRACE FORT LEE NEW JERSEY FOR THE PURPOSE OF TRANSACTING SUCH BUSINESS AS MAY PROPERLY COME BEFORE SUCH MEETING. NO FURTHER NOTICE OF THIS MEETING WILL BE GIVEN
MAURICE L MILLER JR. ASST SECTY.

13 1971 10 AM 1325

8:45 — Pick-up

231 (RS-69)

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

Met Foubel & Duthie
Met with Foggen & Co-owners *:

List – Foubel – We in construction do not intend to work for Foggens Unless you change your position from creditor to stockholder, we will defeat your claim by borrowing so heavily as possible, selling out and leaving you with a shell.

"We get out ahead of Harold." We can borrow like Hell and leave Harold with a shell."

Duthie – You may not be aware of it but I come ahead of you for $1,200,000 and I intend to get mine before you get yours.

* Refugees needs it Bro. Mel Bo is not selling his stock Atty Mel only Dr. Mel is in it. Mel Bo is selling in Foubels and Duthies

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

Frankel's Offer:

Covert $5,500,000 notes now for 287,500 shares.

Titan will give you the 99,250 shares held in the Treasury to be used to raise money for taxes.

Titan will give you an employment contract which will entitle you to a percentage of the net profit of W. F. A. Inc.

---

I told him I would have no reply prior to discussion with Counsel. He asked for delay in which I shall be said will be in Scotland on 5/16

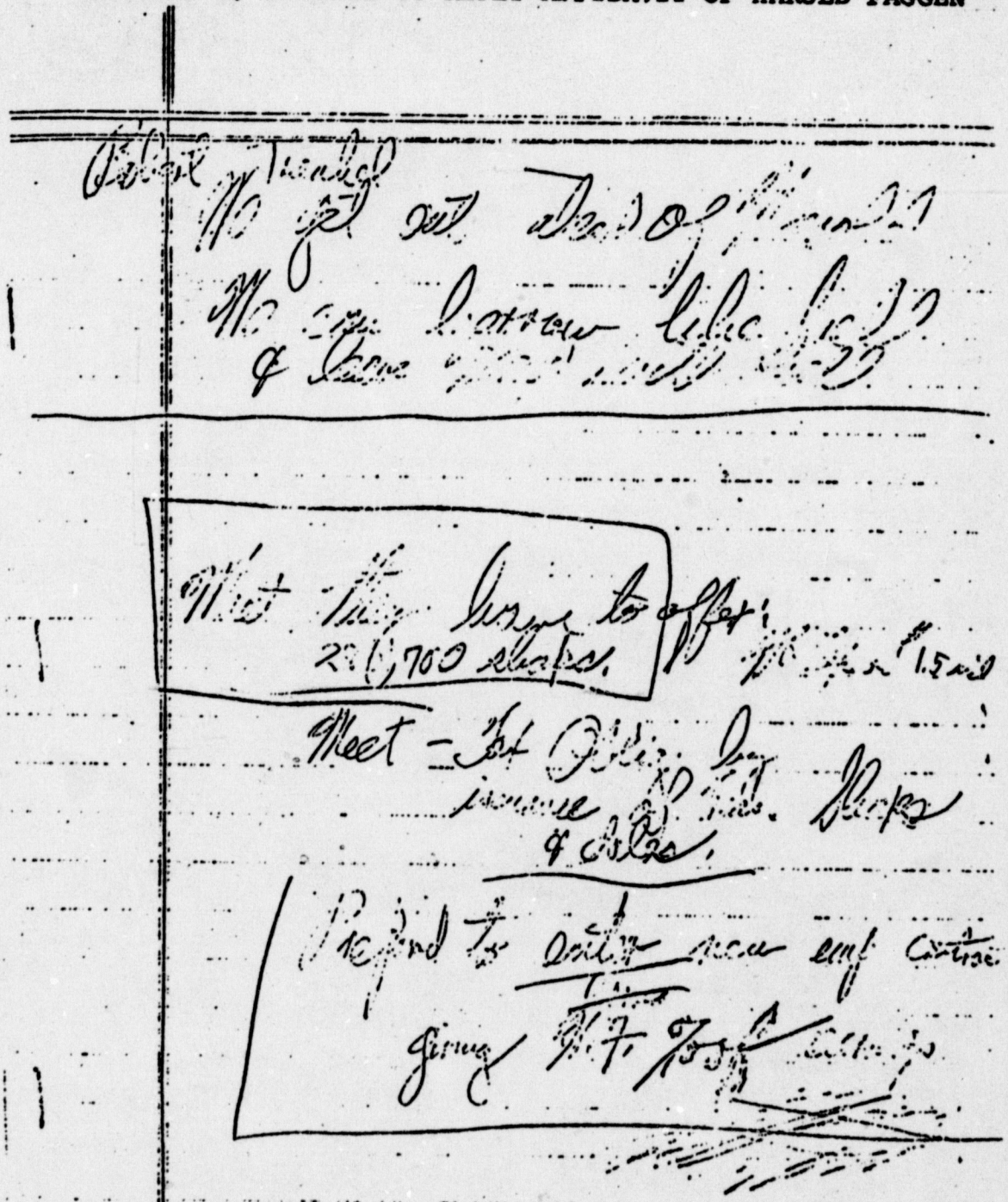
EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

I told him I would have no comment until discussed with Counsel.

He tried to tell me how good offer is and I thanked him for his generosity.

After we broke up to start Directors meeting, he made another remark about my getting % of Fagan earnings and I told him I did not think Fagan is viable because ~~of that~~ all liquid assets have been taken out. No money to finance expansion.

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



# EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

A G E N D A

for

A SPECIAL MEETING OF

THE BOARD OF DIRECTORS OF
TITAN GROUP, INC.

held on May 13, 1971 at
the offices of Sovereign
Construction Company, Ltd.
1325 Inwood Terrace, Fort
Lee, New Jersey at 10.30 a.m.

DISCUSSION:-

Robert James Frankel, Chairman of the Board of Directors chaired the meeting and requested Alvin M. Kendis to act as Secretary of the meeting and to record the minutes thereof.

The following Directors were present, constituting a quorum.

Robert James Frankel
George F. Duthie
Ronald Rosenfeld
~~Samuel N. Bergman~~
Benjamin M. Robinson
Harold Faggen
Alfred M. Frager
Aron Drosi
Jack L. Farley
Alvin M. Kendis
Edmund N. Kaufman

Also present by invitation were:

Herzl Mendelsohn
Daniel C. Hatcher, Jr.
Ollie H. Windhorst

Circulate waiver of notice for signature

RESOLUTIONS:-

1. Change Daniel C. Hatcher, Jr. title - Financial V.P. - Treasurer

2. Dissolving inactive Companies

3. Ed Kaufman -

   a) Dispute re fees

   b) Files in his possession

   c) Other problems

# EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

4. Harold Faggen -

   a) Convertible Debentures and affect on TGI potential (growth and merger)

5. Annual Report 1970 plus - 1st Quarter Earnings and Operations

   a) 15½ million revenues $15,560,000 )
   b) Total Cost and Expense $15,358,000 ) $202,000

      1. Hotels and Motels loss ($186,000)

      2. Sale of Properties reduces fixed expenses $375,000 a quarter but will reduce income by $30,000 per quarter based on 1970 results = $345,000 ± per quarter saving after sales consumated

6. Potential for 2nd and 3rd and 4th Quarters -

   a) Sales of property reflected to take Tax benefits

7. Annual Meeting - 5/26/71 Louisville

   a) Script by Alvin Kandis

   b) Problems - who acts as "Devil's Advocate" NOW

8. Registration Rights — Many individuals have right to registration. Holders have stated they will not press for registration this year (1971)

9. Ernst & Ernst fees - $265,000 ($320,000 at regular rates)

   $125,000 still due -

10. 10-Q Report figures - 5/13/71 - to SEC

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11. Action on Borrowings for Company

| | | | |
|---|---|---|---|
| 1) | Citizens Fidelity - Louisville | 300,000 | |
| 2) | First National of Cleveland | 125,000 | |
| 3) | Mid Atlantic of New Jersey | - | |
| 4) | Chase Manhattan - New York | (1,200,000 | - Blanket Mortgage |
| | | ( 190,000 | - Riverside |
| 5) | Exchange Bank - Chicago | (550,000 | - Demand |
| | | (375,000 | - Miscellaneous |
| 6) | Midland Bank - New Jersey | 250,000 | - Demand |
| 7) | Franklin National Bank - New York | 1,000,000 | - Golden Triangle |

300
125
550
375
250
1,600,000

12. Stockholders Lists

13. Other areas for consideration -

a) Yosemite — Peter 3/31 - $1,500,000 (about)

b) Sid Farber — $1,500,000 Acct offer all cash.

c) Scientific Ecology

d) Allocation of Home Office Overhead

e) Conception of what TGI is to become

f) Uphill Mergers - potential - AVNET CITY INVESTING SAM LEFRAK

g) Status of negotiations for sales of properties

a) Arva Motel, Arlington, Va. (Title for signed Contract by Monday. $200,000 cash in 30 days $100,000 cash)

b) Air Host, JFK, N.Y. Contract signed — $500,000 cash in 5-10 wks.

c) Howard Johnson, New Brunswick $125,000 cash. + $150,000 in

d) Paldor, West Palm Beach — proper

e) Grosvenor House, Hunt Manour, Ohio B & G Buyer wants to see

f) Helmsley-Spear Deal - Golden Triangle, Trojan, Mid-America

g) Du Pont - Riverside - status

h) Sam Bergman - insurance company liabilities

i) Pension and Stock Options

(3)

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

13. a. Stan Berger - Insurance Co. Liabilities

Effected cash sales:

| | |
|---|---|
| Faber | $ 1,500,000 |
| Arva | 800,000 |
| Au Vert | 500,000 |
| Grand Blanc | 125,000 |
| Pallet | 725,000 |
| Gravenor | 500,000 |
| | $ 4,050,000 |

13. b. Stan Berger - Insurance Co. Liabilities

Titan has potential liability which is of unknown dimension.

Hirsch Cab and related Co. sued B. & L. & Stan B. & Shapiro personally because of potential losses because Ins. Co. was insolvent.

Cab Co. has judgment for $60,000.

Peter sued for Cadell $100,000 for liabilities in Oregon.

Defense - Will grant first judgment settle the case?

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

Stewart 5:- Re: First qtr. Objectives —
Amount to be Voted 2¢ per Acre.

46- "We project a strong year for Constr. industry for the 2nd, 3rd & 4th qtrs.

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Bob reported that the Corporation was in default on payments in two instances:

Ed Kaufman notes. (Kaufman stated that the firm does not plans to exercise its right to expedite payment, at this time.)

Harold Faggen's latest payment which was due 5/1/71. Faggen has given formal notice of claim; valuable licenses operative as 5/18/71.

Frankel then called me to discuss and I refused telling him that I would not agree to anything until I had discussed the matter with Counsel.

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

Refer to Directors.

Bob.

I met with Gadsby & Bo this morning.

I want to report that we have not met the deferral payment dates.

Gadsby does not sit as an investor. He sits as a creditor.

We have made suggestions to Gadsby which he will take under advisement.

We have suggested that Gadsby become a stockholder rather than a creditor.

There is good potential in this but we in Construction do not want to indulge this potential for Gadsby's benefit.

(For the record, I stated that I have no comment on the offer until I speak to Counsel. I did not intend Directors to sign off as agreeing to anything).

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

9/14/71

Feb-

I have tried to get Harold to recognize that value of Titan.

It is not fair for H. to sit as a critic & expect us to finish & keep it alive for his benefit. Which, to the contrary, not.

Phyllis Ann is a Paul I because he is a lot smaller than we are but he is not a creditor.

It will take

We have tried to see how we can destroy Harold. He must recognize Titan

"I have a complaint".

"We do not want to make this mine." "P---"

The reason we make is going to fly old bills.

We cannot tolerate it.

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

9/17/71

p2

Complaint:
Titan was engaged prior to 12/2/68
etc.
Filed 3,600,000 shares.
B.M.R— owned
B.M.R- engaged in bus. assoc. with P.B.
Titan Pd. excessive price.
C.J. loses [illegible]
Not arms length - B.M.R.

Why is this done?
In order to negotiate with Pogues
who won't neg, we must take a hard
stand.

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

9/14/71

63

I proposed to Harold - P.F.H.
We should get the votes off the books.

Ben R. - You never voted. You say in there is not true. You know.

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

LAW OFFICES OF

# Burke, Haber & Berick

PHILMORE J. HABER
OF COUNSEL
THOMAS A. BURKE
MORRIS BERICK 1910-1974
RALPH VINCE
ALVIN M. KENDIS
DAVID D. KAUFMAN
STANLEY I. ADELSTEIN
JOSEPH F. LOMBARDO
JACOB I. ROSENBAUM
MILES L. MARKOWITZ
JOSEPH G. BERICK
THOMAS P. MEANEY, JR.
NELSON E. WEISS
MARVIN S. ZELMAN

FIFTEENTH FLOOR
CENTRAL NATIONAL BANK BUILDING
CLEVELAND, OHIO 44114
(216) 771-2?CO

JAMES N. BERIC
LARRY L. WYNC
DONALD W. FARL
ROBERT P. GUV
BRUCE J. BETTI
PHILIP L. CURD
ROBERT D. STOI
SAMUEL S. PEAD
CARL F. G'SLOND
ANTHONY J. HAB
DONALD A. INSU
LAWRENCE I. GIFF
RICHARD A. COL
ANTHONY J. DIVI
JOHN J. PALLAN

October 13, 1971

COPY

TO THE DIRECTORS OF
TITAN GROUP, INC.

Enclosed herewith is your copy of the Special Meeting of the Directors of Titan Group, Inc., held September 14, 1971 at Fort Lee, New Jersey.

Very truly yours,

AMKendis/pjt

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

MINUTES OF A SPECIAL MEETING OF
THE BOARD OF DIRECTORS OF
TITAN GROUP, INC.
held on September 14, 1971 at the offices
of Sovereign Construction Co., Ltd.
1325 Inwood Terrace, Fort Lee, New Jersey
at 1:30 p.m.

Robert James Frankel, Chairman of the Board of Directors, chaired the meeting and requested Alvin M. Kendis to act as Secretary of the meeting and to record the minutes thereof. All of the Directors were present, namely:

Robert James Frankel
George P. Duthie
Ronald Rosenfeld
Herzl Mendelsohn
Benjamin M. Robinson
Harold Faggen
Aron Drost
Jack Farley
Alvin M. Kendis

Also present by invitation was Daniel G. Hatcher, Financial Vice-President and Treasurer of the Company.

The Chairman requested the Secretary of the meeting to cause a copy of the Notice of Meeting and the Affidavit of Mailing thereof to be annexed to and made a part of these minutes.

Minutes of the meeting of July 30, 1971 had been distributed prior to the commencement of this meeting and the Board waived the reading of said minutes. Mr. Faggen queried whether a reference in the minutes to a direction not to "expand" certain operations of Harold Faggen Associates, Inc. precluded new accounts. The Chairman explained that the intention, as emphasized at the meeting of July 30th, 1971, was to maximize profits of Titan Group, Inc. from present business without additional capital improvements and commitments of cash therefor. This would include the right of the Faggen companies to take new business which did not defer profits beyond the initial contract period as where, for example, a new client absorbed development costs relating to the programming of the services to be rendered it.

The Chairman remarked that while several of the principal officers of the Company were not presently

# EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



drawing compensation from the Company itself, it was appropriate to consider fixing officers' compensation for these positions. He noted that the Presidential Freeze Order might affect any action with respect to the payment of compensation at this time and that therefore, he was not requesting any present action except that Mr. Hatcher obtain historical information regarding salaries and compensation previously paid the principal officers of the Company in order that the information would be available as needed in the future.

The next order of business was consideration of the election of an acting Vice-President-Insurance for the purpose of supervising the insurance agencies operated or owned by the Company, the obtaining and evaluating of information from these agencies and reporting back to the Board. Thereupon, on nomination made by Mr. Duthie, seconded by Mr. Rosenfeld, and vote being taken, Herzl Mendelsohn was unanimously elected to serve as acting Vice-President-Insurance of the Company to serve until the first meeting of the Board of Directors following the next annual meeting of the shareholders of the Company and until his successor is duly elected and qualified.

The Board discussed the claim of Alfred Frager for payment of $16,667.00 for services as Chairman and Chief Officer of the Company during a two month period in 1970. Mr. Robinson recalled an agreement to make payment for services but it was to be based upon the salary then being paid to the Chief Executive Officer of the Company. Mr. Frager had premised his claim on the highest then prevailing salary as being $100,000.00 per year, but it was the consensus of several members of the Board that the salary at the time was in the neighborhood of $75,000.00 per year. Mr. Hatcher was instructed to check the records and to report to the Executive Committee as to the amount of the highest prevailing salary paid to the Chief Executive Officer of the Company prior to service by Mr. Frager.

The Chairman reported that the firm of Cherenson, Carroll & Holzer would no longer be rendering public relations services after the end of September. He described the interviews and correspondence which had been conducted with several other proposed Public Relations firms and after a discussion of the pros and cons of the need and desirability for the engagement of a financial public relations firm, decision was deferred to a future meeting.

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



The Board received a report from Herzl Mendelsohn concerning a proposal to reduce life insurance carried on the principal officers of the Company to $250,000.00 each and to reduce life insurance carried on the Division Heads to $100,000.00 each. Mr. Mendelsohn reported that he was preparing schedules and recommendations and cost analysis for submission to the Executive Committee in whose hands the Board left the final decision. Mr. Mendelsohn then made reference to a problem concerning coverage of a Mr. Lou Kraft under the Pension Plan of the Insurance Divisions. It appears that by reason of some mistake, Mr. Kraft was not covered when originally eligible and certain costs would be incurred in now meeting the obligations of coverage. Mr. Mendelsohn was requested to obtain full information and to report to the Executive Committee.

The Chairman described in some detail various meetings and discussion which he had had in the past few weeks concerning possible uphill merger potentials, none of which had any present potential of closing. He further reported that the Executive Committee had approved payment of a 3% fee to Mr. Lawrence Powers, an attorney in New York City if he successfully obtains and negotiates a satisfactory uphill merger for the Company which is consummated.

Brief reference was then made by the Chairman to several companies in the construction or related fields which were seeking acquisition, but the Company is not presently in a position cashwise or stock-value wise to seek to acquire any additional companies.

Efforts to obtain firm proposals based on a fixed program of requirements and services to be rendered by accountants for the year 1971 were described, but no current recommendations were made. The bulk of the billings of Ernst & Ernst for the year 1970 have been resolved except the item of "personnel search services". A further report will be made when the several national accounting firms being contacted have made their proposal and the Executive Committee is prepared to make a recommendation.

The Chairman brought the Board up to date with respect to the Yosemite project, including the absence of any current prospects for the sale of the project and the action which has been requested of the County of Madera for a modification of the agreement with respect to the stages of construction of improvement. All work has basically been stopped pending action by Madera County which had been

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



postponed for two weeks to September 28th and the Chairman indicated his intention that he and Irwin Marmorstein would be present. He reported further that the Company was seeking a loan from Bank of California of some $700,000.00 to be collateralized by the Shasta and Yosemite "paper" and the proceeds of which loan, if obtained, would be used in furtherance of the Yosemite project. The Company is scheduled to hear from the bank by September 17th.

The Chairman called upon Mr. Hatcher for a report as to the progress on the application for a loan from Chase Manhattan Bank consolidating loans presently held from several lending institutions. Mr. Hatcher reported that an approval had come out of committee and he had been advised that a commitment letter would follow upon confirmation from the Citizens Bank of Louisville, Kentucky, as to its participation in the loan. It was emphasized that the loan would basically consolidate certain debt and provide little cash. It would, however, relieve part of the current position of liabilities on the balance sheet. The loan would be secured by mortgages on the company's real estate and by collateral assignments of mortgages owned by the company as well as similar receivables. One of the provisions of the loan would be that 90% of any cash proceeds of sales of collateral would be required to be applied against the loan. Mr. Hatcher expressed his optimism that a commitment would be obtainable in the immediate future.

The estimated earnings of the construction division for the third quarter of the year were then reviewed. Mr. Mendelsohn reported on the earnings position of the insurance agencies and Mr. Faggen provided an analysis of an 8 month statement and a break-down separately stating operating results for that period for the data processing and acturial divisions.

The Chairman stressed the need for a uniform reporting system to be adopted by the agencies constituting the Insurance Division in order that comparisons of operating data could be made based upon comparable reports.

The Chairman reported that the negative net quick assets position of the Company had destroyed its bondability and he emphasized the importance of re-establishing a line of bondability in order to maintain volume in the construction division, particularly in Sovereign Construction Co., and in Multiplex, where substantial business requires the furnishing of large performance bonds.

Ronald Rosenfeld reported on the status of disposition of certain real estate and properties owned by

# EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



the Company. Among other things, he reported that the proposed venture with Connecticut Mutual Life Insurance Company for the ownership and operation of the Grosvenor House Hotel following a mortgage loan from that insurance company no longer seemed workable and that he would, at this time, seek a possible sale of the Company's interest and would report back any developments to the Executive Committee. He also announced that a contract of sale had been signed for the sale of the Golden Triangle Hotel on terms approved by the Executive Committee, being a gross sale price of $1,700,000.00 over the existing balance of the first mortgage, from which sale price the buyer was to receive a credit for a previous deposit he had made on an earlier proposed purchase of the property. A commission of approximately 5% of the total price would be required to be paid to the real estate broker.

Mr. Farley reported on the Orchard Grass Hills project to be entered into by the Jack L. Farley Construction Co. with various Louisville interests for improvement of a large tract of vacant land in the Louisville area as a development for residential, commercial and other uses. He stated that the full report of the proposed venture had been given to the Executive Committee which had approved the same.

Mr. Kendis, as Counsel, reported on certain pending matters, among them the "Carlyle" arbitration which had been pending for several years before the American Arbitration Association. He reviewed the recommendation of Mr. Robinson, whose office had initiated the arbitration proceedings, that they be dropped due to the difficulty in obtaining the necessary witnesses and records and the remoteness of any possibility of a recovery. The Board authorized the dropping of the arbitration proceedings.

The next order of business was consideration of the current status of the dispute between the Company and Alliance Brokerage Agency as to the validity of the latter's executive bonus compensation plan for 1970. The offer by Leonard Friedman for disposition of the dispute by way of the waiver of his bonus and possible compromise of bonuses to two other key agents was described and discussed. It appeared that the original accrual for executive bonuses was approximately $48,000.00 of which $29,000.00 had been previously paid on account, leaving a balance in dispute of almost $19,000.00. Following the discussion, the Board by majority vote authorized Mr. Duthie to attempt to settle the dispute by the payment of approximately $11,440.00 in full settlement of all open executive bonus

# EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



claims for the year 1970. Mr. Rosenfeld voted against the motion and Mr. Frankel abstained from voting on the motion; all other Directors voted in favor.

The Chairman reviewed his investigation with respect to the position of Irell & Manella in the Yosemite transaction as well as the claim by that firm for unpaid legal services represented in part by a promissory note of this company held by it. The Chairman posed a series of possible moves and requested consideration by the Board on each. A discussion followed after which, pursuant to separate motions and separate votes, it was decided:

If the Company is sued by Irell & Manella the Company will defend.

If sued by Irell & Manella, the Company will defend and counterSue.

The Company will not initiate action against Irell & Manella.

The vote with respect to each of the foregoing was unanimous except as to the vote with respect to initiating action against Irell & Manella, where the Chairman recorded his vote in favor of initiating such action, all other Directors voting in the negative. Mr. Kendis was requested to notify Edmund Kaufman of the firm of Irell & Manella of the intention of the Company not to honor its claim for additional attorneys fees. He was also requested to suggest that the Chairman might be willing to sit down with Mr. Kaufman to consider the possibility of settlement out of the claims of the law firm.

In the course of the discussion relating to the Irell & Manella matter, a question was raised concerning the possible obligation of the Directors to initiate action. Mr. Robinson requested Mr. Kendis to comment as Counsel for the Company. Mr. Kendis stated that he did not believe it to be the obligation of the Directors to act unless there were reasonable grounds for the initiation of litigation and a reasonable prospect of a successful conclusion to the litigation. He expressed his opinion that in view of all of the information presently available relating to the services rendered by Irell & Manella, it would be in the best interests of the Company if some settlement were achieved.

Mr. Kendis reported to the Board that certain pending litigation against the Company by Joseph Bonepurth, a former

# EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



officer of the Company, was to be called for trial in the near future. He stated that Counsel handling the case for the Company had informed him of a proposed settlement offer of $32,500.00 of which one-half or $16,250.00 would be contributed by the Company and the remaining half by a co-defendant. After discussion, it was agreed that the Company should propose a contribution of $5,000.00 to any negotiated settlement and authorized the Chairman to increase the contribution by the Company as he might deem advisable in his discretion, in order to dispose of the action by settlement.

The Chairman referred to the Bergman & Lefkow Insurance Agency and a brief discussion followed concerning the adequacy of standardized accounting records and reporting, the aging of some $900,000.00 of accounts receivable and the possible termination of employment of Jerry Bergman.

The Chairman then described his efforts to convince Mr. Faggen to restructure his interest in the Company. He commented on the effect of the debentures on possible merger, bonding capacity and profit position. He stated that as a result of Mr. Faggen's refusal to consider such restructuring, the Executive Committee had caused an investigation to be made to determine whether or not there was some basis for setting aside the transaction in which the debentures had been issued. The records of the transaction contained in the Company's home office were delivered to Sidney Silverman, an attorney in the City of New York, who had been engaged as independent Counsel and who wrote to the Chairman expressing an opinion that based upon his examination of such records, the Company had a meritorous claim against Messrs. Faggen & Robinson. The Chairman then read a proposed complaint against Messrs. Faggen & Robinson prepared by Mr. Sidney Silverman.

Mr. Robinson vigorously protested against the statements of the complaint and the threat of litigation, claiming that he was being joined as a proposed defendant solely for the purpose of seeking to cause him to put pressure on Mr. Faggen to accept some restructuring of his debentures. Mr. Robinson read certain correspondence which he had written to Mr. Frankel describing his version of the facts of the negotiations and the valuation of the Faggen companies at the time they were acquired by the Company. A substantial area of dispute centered around whether negotiations leading to the acquisition and the determination of the price to be paid therefor had been conducted by Mr. Robinson or his office, or by Edmund Kaufman or his office. Mr. Robinson threatened action against the Directors if the complaint were filed joining

# EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



him as a defendant.

Upon the conclusion of remarks by Mr. Robinson, Mr. Faggen also made a statement in response and denied the truth of the allegations of the complaint. Both Messrs. Faggen and Robinson commented with respect to the assets of the Faggen companies at the time of their acquisition, as well as their earnings and the relationship thereof to the valuation placed upon them in fixing the amount of debentures to be issued for their acquisition.

Several of the Directors indicated that they would have to leave the meeting in order to keep other engagements or to get to the airport in time to catch their scheduled planes. The Chairman then declared the meeting duly adjourned at 8:20 p.m.

Alvin M. Kendis, Secretary of the Meeting

ATTEST:

Robert James Frankel, Chairman

# EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

TITAN GROUP, INC.

ROBERT JAMES FRANKEL
CHAIRMAN OF THE BOARD
CHIEF EXECUTIVE OFFICER

September 15, 1971

Titan Group, Inc.
222 Executive Park
Louisville, Kentucky 40207

Attention: Mr. George F. Duthie

Multiplex, Inc.
2121 S. Green Road
Cleveland, Ohio 44121

Attention: Mr. Ronald Rosenfeld

Re: Harold Faggen Esq.
Our File RJF 0185-55

Gentlemen:

In accordance with the discussion held at the Board of Directors Meeting of September 14, 1971, it is my understanding that you will meet with Messr's Harold Faggen and Ben Robinson immediately for the purpose of structuring a cancellation of the $5,500,000.00 convertible debenture as a means of resolving the outstanding dispute between TGI present management and Mr. Harold Faggen.

It must be clearly understood that any such action on your part must be reviewed by the Executive Committee and the Board of Directors and that there is no authority to conclude an agreement until formal action of these Boards.

You are further advised, in accordance with the determination of the Executive Committee, that unless immediate resolution of these problems is effected and a position of compromise reached prior to the due date of the next interest payment on the debentures, that we have received advice from counsel, in writing, that a formal proceeding could be instituted against Mr. Harold Faggen, et. al.

While, as Chief Executive Officer, I am particularly anxious to avoid litigating this issue, the refusal of Mr. Harold Faggen to negotiate a compromise may leave us no alternative.

Your prompt advice as to the action taken in this matter will be required.

Sincerely yours,

TITAN GROUP, INC.

By: Robert James Frankel
Chairman of the Board and
Chief Executive Officer

RJF:as
cc: Alvin M. Kendis, Benjamin M. Robinson, Harold Faggen, Daniel C. Hatcher

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

TO ALL MEMBERS OF BOARD OF DIRECTORS OF TITAN:

I advised the members of the Board at our meeting yesterday that I would send to each member copies of the two documents which I read to the Board for their information. They are enclosed herewith and are: (1) copy of my letter to Robert Frankel dated March 31, 1971; (2) copy of my letter to Robert Frankel dated April 8, 1971, with memo attached.

The minutes of this Board meeting will of course contain my reference to the information given to your Executive Committee recently by Simon Sheib, Esq., that he, and only he, represented Harold Faggen in his negotiations with Ed Kaufman who represented Titan. My office assisted Kaufman under Kaufman's direction, in formalizing the transaction in New York.

I expect the minutes to contain also the Chairman's statement that the proposed suit against me is "for the purpose of forcing negotiations with some one who won't negotiate." The minutes will also of course contain my statement that the proposed suit is being brought in total disregard of the facts for an ulterior purpose, mainly to force me to put pressure on Faggen to negotiate.

Under the circumstances I confirm what I stated to the Board that if the proposed spurious suit is instituted I will hold the Directors individually responsible for the consequences of their action.

You are all free to make such inquiries as you desire to ascertain the facts.

Benjamin M. Robinson

September 15, 1971.

# EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

LAW OFFICES OF

Burke, Haber & Berick

FIFTEENTH FLOOR

CENTRAL NATIONAL BANK BUILDING

CLEVELAND, OHIO 44114

(216) 771-2700

October 20, 1971

DIRECTORS OF TITAN GROUP, INC.:

Gentlemen:

As a result of comments by Messrs. Robinson and Faggen with respect to the Minutes of the Special Meeting of the Board of Directors of Titan Group, Inc., held September 14th, 1971, I have revised said minutes in the respects hereinafter described and request that you substitute the enclosed revised pages 7 and 8 for the similarly numbered pages in the copy of the minutes previously sent to you.

The changes made are as follows:

1. The first line of the last paragraph on page 7 of the minutes which formerly read "Mr. Robinson vigorously protested against the ***" has been revised to read "Mr. Robinson vigorously denied the ***"

2. The second sentence of the first full paragraph on page 8 which formerly commenced "Both Messrs. Faggen and Robinson commented with respect to ***" has been revised to commence "Mr. Robinson commented with respect to ***".

Very truly yours,

AMKendis/pjt

# EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



officer of the Company, was to be called for trial in the near future. He stated that Counsel handling the case for the Company had informed him of a proposed settlement offer of $32,500.00 of which one-half or $16,250.00 would be contributed by the Company and the remaining half by a co-defendant. After discussion, it was agreed that the Company should propose a contribution of $5,000.00 to any negotiated settlement and authorized the Chairman to increase the contribution by the Company as he might deem advisable in his discretion, in order to dispose of the action by settlement.

The Chairman referred to the Bergman & Lefkow Insurance Agency and a brief discussion followed concerning the adequacy of standardized accounting records and reporting, the aging of some $900,000.00 of accounts receivable and the possible termination of employment of Jerry Bergman.

The Chairman then described his efforts to convince Mr. Faggen to restructure his interest in the Company. He commented on the effect of the debentures on possible merger, bonding capacity and profit position. He stated that as a result of Mr. Faggen's refusal to consider such restructuring, the Executive Committee had caused an investigation to be made to determine whether or not there was some basis for setting aside the transaction in which the debentures had been issued. The records of the transaction contained in the Company's home office were delivered to Sidney Silverman, an attorney in the City of New York, who had been engaged as independent Counsel and who wrote to the Chairman expressing an opinion that based upon his examination of such records, the Company had a meritorious claim against Messrs. Faggen & Robinson. The Chairman then read a proposed complaint against Messrs. Faggen & Robinson prepared by Mr. Sidney Silverman.

Mr. Robinson vigorously denied the statements of the complaint and the threat of litigation, claiming that he was being joined as a proposed defendant solely for the purpose of seeking to cause him to put pressure on Mr. Faggen to accept some restructuring of his debentures. Mr. Robinson read certain correspondence which he had written to Mr. Frankel describing his version of the facts of the negotiations and the valuation of the Faggen companies at the time they were acquired by the Company. A substantial area of dispute centered around whether negotiations leading to the acquisition and the determination of the price to be paid therefor had been conducted by Mr. Robinson or his office, or by Edmund Kaufman or his office. Mr. Robinson threatened action against the Directors if the complaint were filed joining him as a defendant;

Upon the conclusion of remarks by Mr. Robinson,

EXHIBIT P, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

Minutes of a Special Meeting
of the Board of Directors of
Titan Group, Inc. held
September 14, 1971



Mr. Faggen also made a statement in response and denied the truth of the allegations of the complaint. Mr. Robinson commented with respect to the assets of the Faggen companies at the time of their acquisition, as well as their earnings and the relationship thereof to the valuation placed upon them in fixing the amount of debentures to be issued for their acquisition.

Several of the Directors indicated that they would have to leave the meeting in order to keep other engagements or to get to the airport in time to catch their scheduled planes. The Chairman then declared the meeting duly adjourned at 8:20 p.m.

Alvin H. Kandis, Secretary of
the Meeting

ATTEST:

Robert James Frankel, Chairman

EXHIBIT Q, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.

A-2 Tab 13 (2)

December 2, 1968

HAROLD FAGGEN hereby promises to pay on January 2, 1969, to ACTUARIAL TABULATING CORP. at 853 Broadway, New York, New York, the sum of Forty-Two Thousand Four Hundred Dollars ($42,400), with interest at the rate of 6% per annum. This note is non-negotiable.

Harold Fagg

HAROLD FAGGEN

**EXHIBIT Q, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN**

December 2, 1968

TITAN GROUP, INC. hereby promises to pay on anuary 2, 1969, to HAROLD FAGGEN, at 11 Fifth Avenue, ew York, New York, the sum of Forty-Two Thousand Four undred Dollars ($42,400), with interest at the rate f 6% per annum. This note is non-negotiable.

TITAN GROUP, INC.

By _____
President

By _____
Secretary

# EXHIBIT R, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.

## ...fman's First Draft Of Contract

...epresentations and Warranties of the FAGGEN ...ERS. The FAGGEN SHAREHOLDERS hereby jointly and ...ly represent and warrant the following (the truth and ... of each of which shall constitute a condition prece... TITAN's obligations hereunder):

3.1 Financial Statements. Attached hereto and ...part hereof are the following exhibits:

Exhibit "C" - Balance Sheet and supporting schedules of each of the FAGGEN COMPANIES as at the end of the last fiscal year of each.

Exhibit "D" - Income Statement, together with supporting schedules, of each of the FAGGEN COMPANIES for their last fiscal years.

Exhibit "E" - Balance Sheet and supporting schedules of each of the FAGGEN COMPANIES as at September 30, 1968.

Exhibit "F" - Income Statement, together with supporting schedules, of each of the FAGGEN COMPANIES for the periods ended September 30, 1968.

Exhibits "C", "D", "E" and "F" (i) are in accordance ... respective books and records of the FAGGEN COMPANIES ... as stated therein to the contrary), (ii) set forth ...ach of their financial condition and results of ...ons as at the relevant dates thereof and for the ...s covered thereby, all prepared in accordance with ...ly accepted accounting principles, (iii) contain and ... all necessary adjustments for a fair presentation of ...sults of operations and financial condition for the ...s covered by said financial statements, and (iv) with ...t to each of the FAGGEN COMPANIES' contracts and commit... contain and reflect reserves for all material ...ties and for all reasonably anticipated material ... and costs in excess of expected receipts.

## Final Contract

3. Representations and Warranties of the Seller. The Seller represents and warrants the following as of the date hereof:

3.1 Financial Statements. Attached hereto and made a part hereof are the following exhibits:

Exhibit B - Tax returns including income statement, balance sheet and supporting schedules of the Company for each of its last five (5) complete fiscal years.

Exhibit C - Unaudited financial statements of the Company prepared by Joseph Warren & Company, consisting of a balance sheet as of September 30, 1968, and a statement of income and expenses for the three (3) months ended September 30, 1968, together with the comments in the accompanying letter of transmittal from Joseph Warren & Company to the Company.

(i) Exhibit "B" consists of copies of the tax returns filed by the Company for the fiscal years indicate... thereon.

(ii) Subject to the matters contained in the let... of transmittal which is part of Exhibit "C", said Balance Sheet presents fairly the financial condition of the Compa... as at September 30, 1968, and said statement of income an... expenses presents fairly the results of the Company's operations for the three (3) month period ended September 30, 1968. The said financial statements were prepared from the books and records of the Company and except as indicated therein were prepared in conformity with genera... accepted accounting principles.

**EXHIBIT R, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN**

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(NY-136111B05113)ID COVCO FORT 0449P EDT06/15/72 JUN 15 PM 6 45
WCZC 3 FORT LEE N J 6 16 1972
MR. EDWARD SWADUCK
LOCAL 1 AMALGAMATED LITHOGRAPHERS OF AMERICA
113 UNIVERSITY PLACE
NEW YORK N Y 10003

BT

WE ARE MOST CONCERNED ABOUT THE TELEGRAM RECEIVED FROM YOUR OFFICE TODAY. WE MUST INDICATE THAT THE SERVICES PERFORMED FOR YOU BY MR FAGGEN WERE ONLY THE VISIBLE RESULTS OF MANY HOURS OF CONSULTATION WITH MANY OF THE PROFESSIONALS WHO ARE EMPLOYED AT HAROLD FAGGEN ASSOCIATES INC. THESE PROFESSIONALS ARE STILL EMPLOYED AND WILL CONTINUE TO PROVIDE ALL THE REQUIRED SERVICES AND PERSONAL ATTENTION YOU HAVE RECEIVED IN THE PAST. YOU SHOULD

SF-1201 (RS-68)

APPENDIX A, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.

BE AWARE THAT HAROLD FAGGEN ASSOCIATES INC IS AN ACTUARIAL CONSULTING FIRM AND ALL ACTUARIAL SERVICES WERE PERFORMED UNDER THE DIRECTIONXF TWO MEMBERS OF THE AMERICAN ACADEMY OF ACTUARIES, WHO WILL NOW, IN ADDITION TO THESE DUTIES, BE RESPONSIBLE FOR THE MANAGEMENT OF THE COMPANY. THE OTHER PROFESSIONAL SERVICES OF THE COMPANY WILL BE CONTINUED WITH EQUAL VIGOR. AS YOU KNOW HR HAROLD FAGGEN IS NOT AN ACTUARY SO THAT YOUR ACTUARIAL SERVICES WILL NOT BE IMPAIRED IN HIS ABSENCE. THIS CHANGE WILL ONLY AFFECT THE INTERNAL MANAGEMENT OF HAROLD FAGGEN ASSOCIATES INC AND I FEEL WILL IMPROVE THE ACTUARIAL SERVICES YOU WILL RECEIVE IN THE FUTURE.
TITAN GROUP, INC.
BY: ROBERT JAMES FRANKEL

BF-1701 (R5-69)

CHAIRMAN OF THE BOARD AND
CHIEF EXECUTIVE OFFICER
[illegible]

APPENDIX B, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN.

*APPENDIX*

The purpose of this Appendix is two-fold:

I. To further illustrate how it would have been impossible for anyone looking at the handwritten statements which I showed Kaufman on September 6, 1968, and Exhibit A of the handwritten statement which I gave to Titan after our meeting on October 2, 1968, to have thought that the last column of Exhibit A was prepared on the same basis as the earlier statement.

II. To explain each adjustment of both statements in detail:

I

The two statements are so clearly different on their faces that I am merely reproducing them and telling them to speak for themselves. I can add nothing to the statements which are already set forth in my affidavit. The handwritten statements of figures are attached hereto in their original form. I have reproduced both sides of the two pages which Kaufman and I discussed on September 6, 1968, and the single exhibit which I prepared after our meeting on October 2, 1968.

APPENDIX B, ANNEXED TO REPLY AFFIDAVIT
OF HAROLD FAGGEN

II

The balance of this appendix will be devoted to an explanation of the adjustments made to net income as shown on income tax returns when I prepared the earlier statement for discussions with Diebold (Kaufman Ex. 4) and those I made when I prepared the later statement after the October 2, 1968 meeting with Kaufman and Frank. (Kaufman Ex. 5A)

A. *With respect to Harold Faggen Associates, Inc.*

The net income per the federal income tax return for the fiscal year ended June 30, 1968, was $288,494 and that was the starting figure for both statements. An adjustment of $58,108 for pension overfunding was made for both statements. (Pension contribution amounting to $58,108 was actually made and was properly tax deductible, despite the fact that such contribution was in excess of actuarial requirements and, therefor, would not have been made by either Diebold or Titan). An adjustment of $25,700 for Harold Faggen's salary was made for both statements. ( I had been paid a salary of $75,700 during the fiscal year, but I had agreed with both Diebold and Titan that my

salary would have been only $50,000 a year if either company had operated the business). An adjustment of $14,820 for state and city income taxes was made on both statements since both compilations were to be pre-tax. The points of difference were as follows -

(a) On the statement for Diebold, there was an adjustment for prepaid salaries of $22,950 to Rose Dogan and $13,162 to George Stewart. There was no similar adjustment on the Titan statement because no adjustment for prepaid and accrued expenses was contemplated.

(b) On the Diebold statement, there was an adjustment deducting investment income of $31,905 because that deal contemplated payment for the market value of the investment portfolio and certain other assets separately. Since the Titan deal did not contemplate any such separate payment, no similar adjustment was made on that statement.

(c) On the statement prepared for Titan, there was an adjustment of $5,900 in Rose Dogan's salary because the Titan deal contemplated a reduction in her salary from $45,900 a year to $40,000. This was

later made a condition of the contract with Titan. The Diebold deal did not contemplate such limitation on her salary.

(d) On the statement prepared for Titan, there was an adjustment of $37,574 for various expenses which had been paid by Harold Faggen Associates, Inc. as a privately held company, but which would not have been paid by Titan under the deal we were discussing. These various expenses included apartment rent, boat expenses, excessive expenditures for travel, entertainment, automobiles, etc. On the statement prepared for the Diebold deal, there was no similar adjustment directly related to Harold Faggen Associates, Inc., but there was an overall adjustment for expense items that will not recur. This will be discussed later in this Appendix.

APPENDIX B, ANNEXED TO REPLY AFFIDAVIT
OF HAROLD FAGGEN

*RECAP WITH RESPECT TO HAROLD FAGGEN ASSOCIATES, INC.*

| | Per Statement Prepared for Diebold | Per Statement Prepared for Titan |
|---|---|---|
| Net Income per Federal Income Tax Return | $288,494 | $288,494 |
| Adjustments: | | |
| Pension overfunding | 58,108 | 58,108 |
| Harold Faggen salary | 25,700 | 25,700 |
| State and City Income Taxes | 14,820 | 14,820 |
| Prepaid Salary - Rose Dogan | 22,950 | |
| Prepaid Salary - George Stewart | 13,162 | |
| Investment income (deduct) | (31,905) | |
| Rose Dogan salary | | 5,900 |
| Various Expenses | | 37,574 |
| Totals | $391,329 | $430,596 |

B. *With Respect to Actuarial Tabulating Corp.*

The net income per the federal income tax returns for the fiscal year ended March 31, 1968 was $40,045 and that was the starting figure for both statements. An adjustment of $6,348 for pension contribution was

APPENDIX B, ANNEXED TO REPLY AFFIDAVIT
OF HAROLD FAGGEN

made for both statements since this pension fund was to be discontinued under both deals. An adjustment of $12,000 eliminating Harold Faggen's salary was made for both statements. An adjustment of $3,814 for state and city income taxes was made on both statements. The points of difference were as follows:

(a) On the statement prepared for Titan, there was an adjustment of $3,600 eliminating Rose Dogan's salary since her total salary was limited to $40,000 a year already provided for above in the adjustments relating to Harold Faggen Associates, Inc. The Diebold deal did not contemplate such limitation on her salary.

(b) On the Diebold statement, there was an adjustment deducting investment income of $10,756 for the reasons already set forth above. No similar adjustment was made on the Titan statement for reasons also set forth above.

APPENDIX B, ANNEXED TO REPLY AFFIDAVIT
OF HAROLD FAGGEN

*RECAP WITH RESPECT TO ACTUARIAL TABULATING CORP.*

| | Per Statement Prepared for Diebold | Per Statement Prepared for Titan |
|---|---|---|
| Net Income per Federal Income Tax Return | $40,045 | $40,045 |
| Adjustments: | | |
| Pension fund elimination | 6,348 | 6,348 |
| Harold Faggen salary | 12,000 | 12,000 |
| State and City income taxes | 3,814 | 3,814 |
| Rose Dogan salary | | 3,600 |
| Investment income (deduct) | (10,756) | |
| Totals | $51,451 | $65,806 |

C. *With Respect to Employee Fund Services, Corp.*

This corporation had a fiscal year ending on September 30, so that the statement prepared for Diebold during July and August, 1968, was based on the figures for the fiscal year ended 9/30/67 and Kaufman's Exhibit 4 clearly so states. Since the statement prepared for Titan came much later, we had fairly reliable estimates of the figures for the fiscal year ended 9/30/68 and

## APPENDIX B, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

Exhibit A to Kaufman's Exhibit 5A does clearly state that the figures in the last column are applicable to the fiscal year ended September 30, 1968. Under these conditions, it is not possible to make any meaningful comparisons but each figure was arrived at as follows:

For the Doebold statement -

| | |
|---|---|
| Net income for the fiscal year ended Sept. 30, 1967, per income tax return | $21,597 |
| Adjustment adding back state and city income taxes for reasons already set forth | 2,755 |
| Adjustment deducting investment income for reasons already discussed (deduct) | (2,652) |
| Total as adjusted | $21,700 |

For the Titan Statement -

| | |
|---|---|
| Net income for the fiscal year ended Sept. 30, 1968, per estimated work sheet | $26,661 |
| Adjustment eliminating fee paid to Rose Dogan since her total remuneration was to be limited to the $40,000 per year to be paid by Harold Faggen Associates, Inc. | 900 |
| Adjustment adding back estimated state and city income taxes for reasons already set forth | 1,543 |
| Total as adjusted | $29,104 |

APPENDIX B, ANNEXED TO REPLY AFFIDAVIT
OF HAROLD FAGGEN

Since the figures used in the Titan statement were based on estimates because the statement was prepared a few days after the end of the fiscal year on September 30, 1968, it may be of interest to note that the total as adjusted on the basis of the actual income tax returns would have been $29,481 instead of $29,104 which appears in Exhibit A to Kaufman's Exhibit 5A.

D. *With Respect to Fund S & E Corp.*

The net income per the federal income tax return for the fiscal year ended June 30, 1968, was $10,476 and that was the figure which I intended to use as the starting figure for both statements. Due to a copying error, however, I used $10,416 in the Diebold statement. The statement prepared for Titan was based on the correct figure of $10,476. There was no adjustment to this starting figure for the Titan statement but there was an adjustment of $3,500 on the Diebold statement for "Special Work in Process". This adjustment was required because the Diebold deal contemplated capitalizing certain programming costs whereas the Titan deal did not.

APPENDIX B, ANNEXED TO REPLY AFFIDAVIT
OF HAROLD FAGGEN

*RECAP WITH RESPECT TO FUND S & E CORP.*

| | Per Statement Prepared for Diebold | Per Statement Prepared for Titan |
|---|---|---|
| Net Income per federal income tax return | $10,416 | $10,476 |
| Adjustment for "Special Work in Process" | 3,500 | ——— |
| Totals | $13,916 | $10,476 |

Note that there was no adjustment for state and city income taxes because this was a new corporation and no state or city income tax had been paid.

E. *With Respect to Harold Faggen Personal Services.*

During 1968, I was assured of $35,280 in fees for accounting services rendered for certain clients. I had always kept such fees as additional personal compensation. Under the deal contemplated by Diebold as well as the deal contemplated by Titan, all such income would have been income to the acquiring corporation.

F. *With Respect to "Special Work in Progress - $25,000".*

This adjustment appears only on the Diebold statement. In that deal, this item was to be capitalized because it represented a great deal of work which had

been done in connection with lawsuits in which the potential fees were very high. No such adjustment was made in preparing the Titan statement because, as I have already stated above, there were to be no adjustments for prepaid or accrued expenses.

G. *With Respect to "Expense Items that Will Not Recur - $32,800".*

In discussing the adjustments with respect to Harold Faggen Associates, Inc., item A, above, there was an explanation in paragraph (d) of an adjustment of $37,574 made in connection with the preparation of the statement for Titan. This adjustment was for apartment rent, boat expenses, excessive expenditures for travel, entertainment, automobiles, etc., which would not have been incurred if Harold Faggen Associates, Inc., had been owned by Titan. There was no similar adjustment to the income figures of Harold Faggen Associates, Inc. for the Diebold statement. However, there was an overall adjustment of $32,800 for similar expenses which would not have been incurred if Diebold had owned the Faggen Companies during the preceeding year. The amount was approximately $5,000 less in the case

APPENDIX B, ANNEXED TO REPLY AFFIDAVIT
OF HAROLD FAGGEN

of Diebold because they indicated that their control of expenses would have been less rigid than the controls which Titan would have exercised.

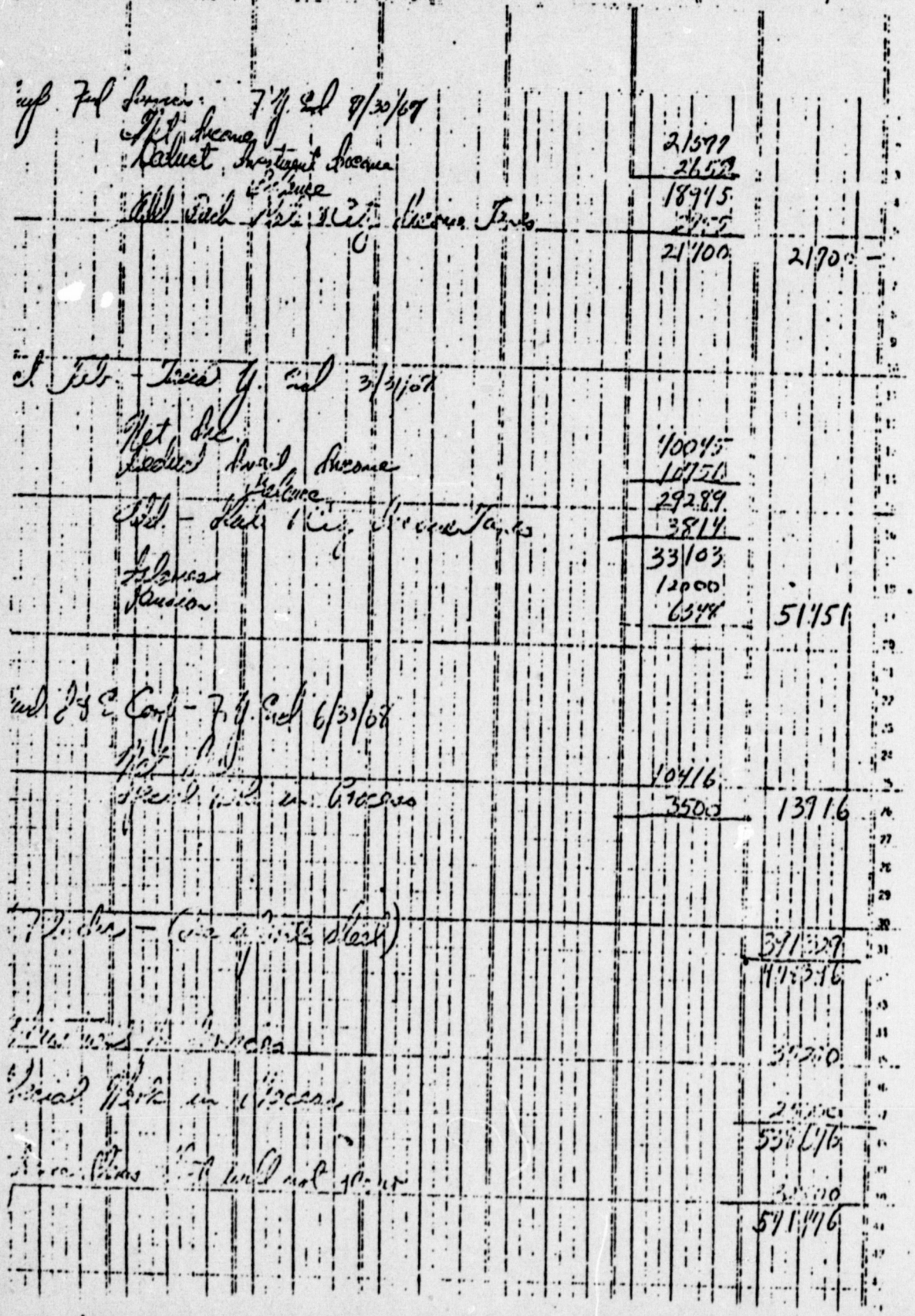
*FINAL RECAP*

| | | Per Statement Prepared for Diebold | Per Statement Prepared for Titan |
|---|---|---|---|
| A. | Totals from Recap with respect to Harold Faggen Associates, Inc. | $391,329 | $430,596 |
| B. | Totals from Recap with respect to Actuarial Tabulating Corp. | 51,451 | 65,806 |
| C. | Totals with respect to Employee Fund Services For Fiscal year ended 9/30/67 | 21,700 | |
| | For Fiscal year ended 9/30/68 | | 29,104 |
| D. | Totals from Recap with respect to Fund S & E Corp. | 13,916 | 10,476 |
| E. | With respect to Harold Faggen Personal Services | 35,280 | 35,280 |
| F. | With respect to "Special Work in Process" | 25,000 | |
| G. | With respect to Expense items that will not recur | 32,800 | |
| | Grand Totals | $571,476 | $571,262 |

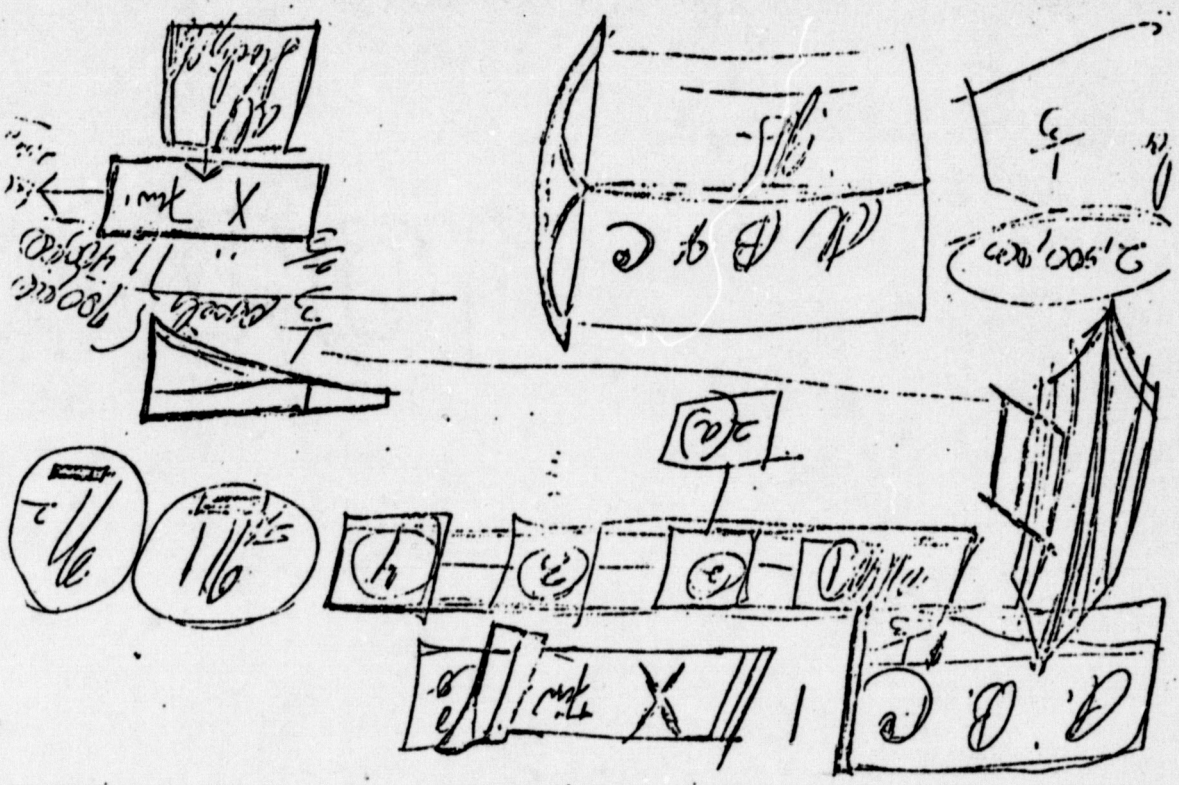
APPENDIX B, ANNEXED TO REPLY AFFIDAVIT
OF HAROLD FAGGEN

Hence, in summary, therefore, it is perfectly possible to explain precisely how both of these exhibits were prepared, why they are by no means contradictory and why they are both precisely accurate. The plaintiff's affidavits suggest some chicanery in the two exhibits because they arrive at almost the same total when, in fact, they know quite well that the one, Kaufman Exhibit 4, was prepared for a different transaction which was based on certain assumptions which Mr. Kaufman rejected and the other, Kaufman Exhibit 5A, was prepared to coincide precisely with the agreement that I was making with Titan and to show what would have happened in the years 1964 to 1968 had the conditions which I was negotiating with Kaufman been in effect during those prior years.

APPENDIX B, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



APPENDIX B, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

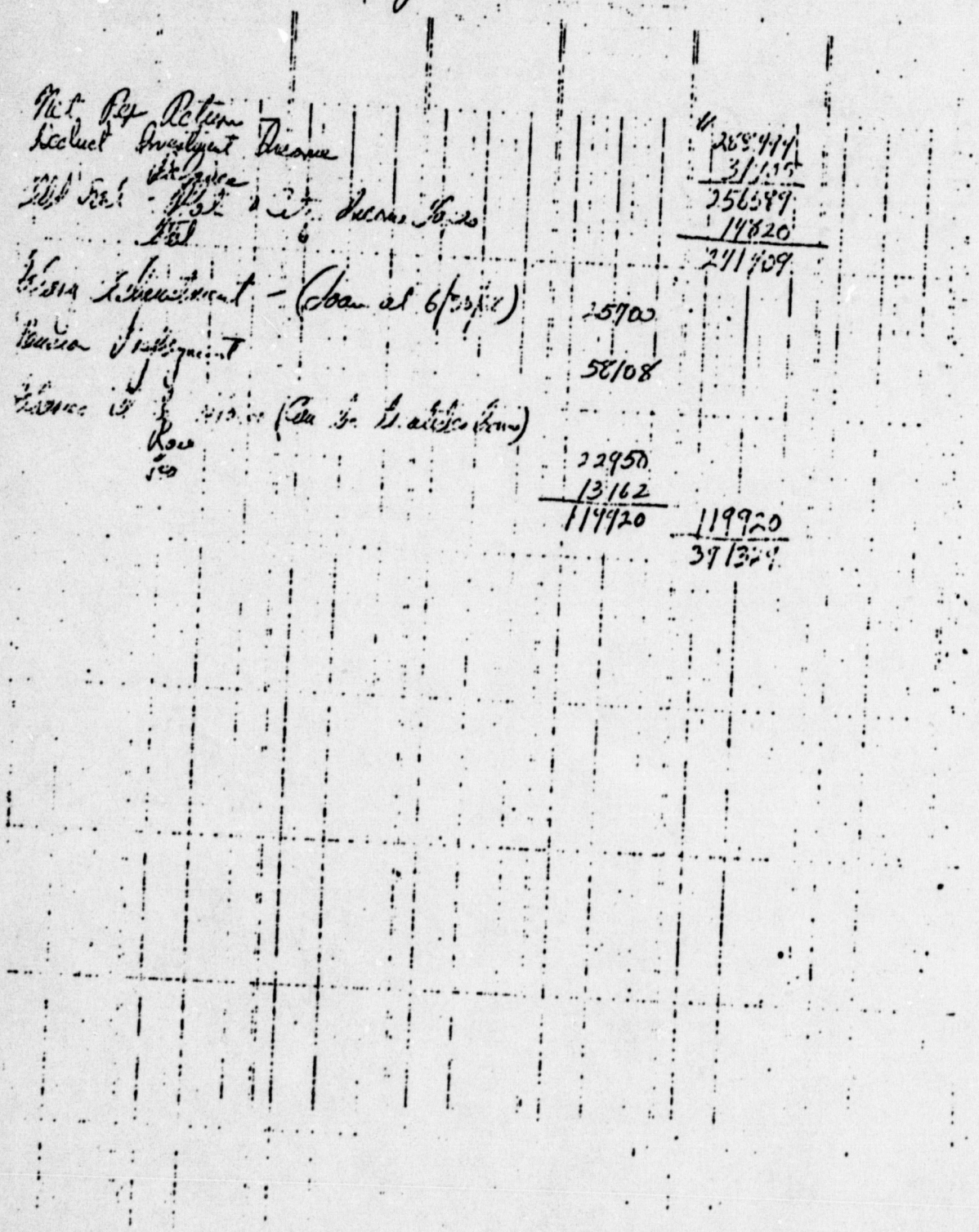


1. (A) contracts to buy 1/3 of Corp. Stock of W.F. interests for $2.5ma

2. W.F. agrees to exchange bal. of stock in W.F. Enterprises for shares in X Corp.

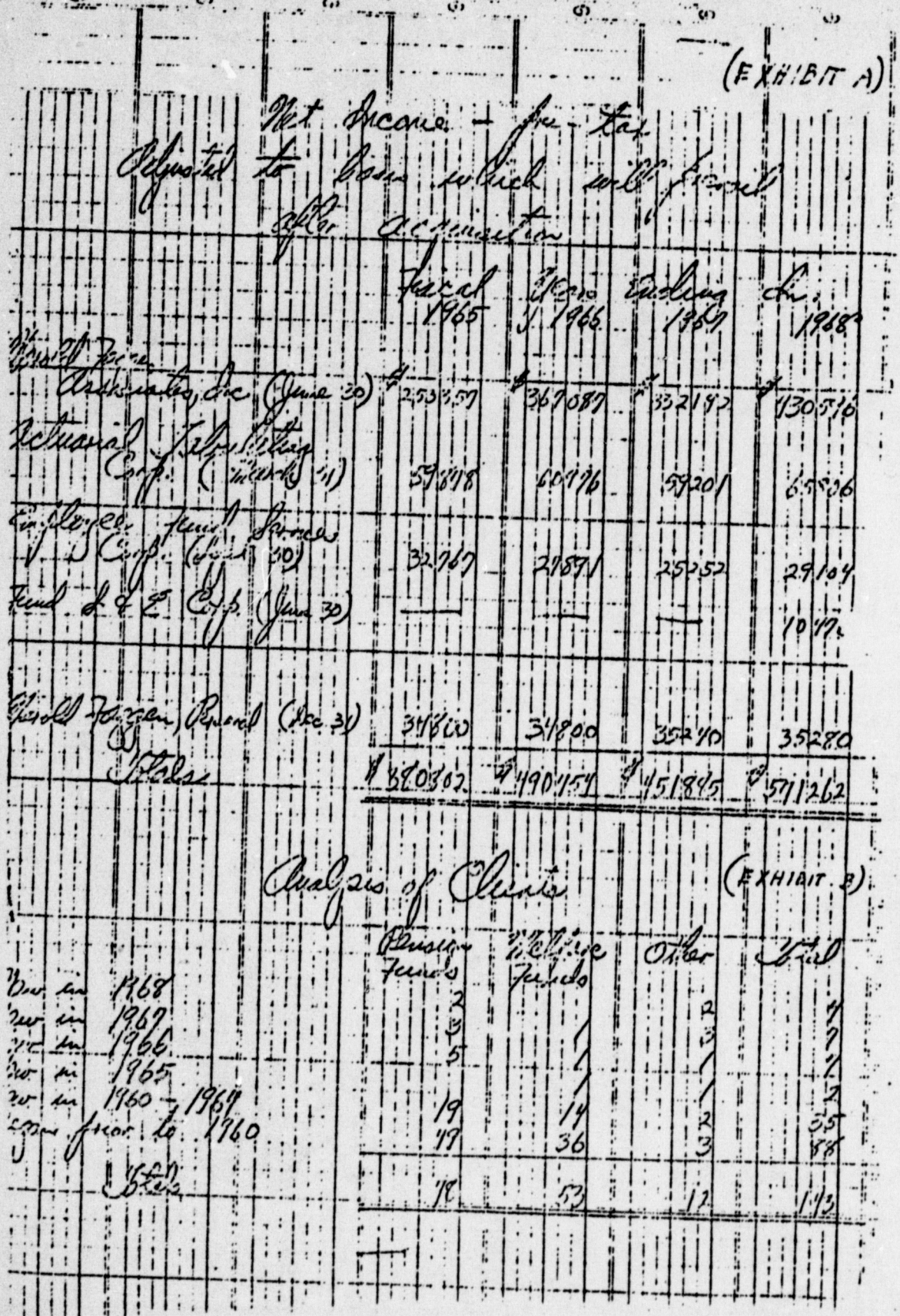
APPENDIX B, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN

Adjustments



3yrs out
1970
1971
1972
A = Private Investment
SDI —
HF
X =
Y =
Public
1968 Sold for 7.5 million
reduce 5 million to X billion
Joint
A 25
X
10 minutes
25 Hectares
50
2.5 mile
5.0
Circle
2.5
2.5
5.0
5.0
25
5.0
3,700
25

APPENDIX B, ANNEXED TO REPLY AFFIDAVIT OF HAROLD FAGGEN



REPLY AFFIDAVIT OF EDMUND M. KAUFMAN IN SUPPORT OF PLAINTIFF'S MOTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of California

County of Los Angeles

EDMUND M. KAUFMAN, being duly sworn, deposes and says:

1. I have read the Faggen and McIntyre affidavits and exhibits and I make the following response.

2. After being silent in his original motion papers on the fact that he negotiated with me and gave me a set of detailed adjustments that added up to $571,000 in earnings for 1968, Faggen now admits that he had two decisive negotiating conferences with me on September 6 and October 2, 1968, and that he supplied these figures. He tries to make the figures he gave me (Ex. 3, Kaufman affidavit) something remote by calling them the "Diebold Statement," because he gave the same adjusted earnings figures to another potential buyer, Diebold Corp. But they were not remote - they were the total earnings of $571,000 that I relied on, and the pro-forma adjustments that made up such total. His use of the pro-forma

presentation with another potential buyer confirms that this approach was Faggen's basic selling tool in marketing his company. As to the amount being payable in corporate currency, not $5.5 million in cash, Faggen wanted stock from Diebold and stock from Titan, and as I stated, I renegotiated his demands for a tax-free deal into subordinated convertible notes. The ten times multiple based on the restated earnings in excess of $550,000 (with no separate payment for net worth) was always intended to be paid in corporate currency.

3. Now Faggen says I disagreed with such adjustments, (par. 36, Faggen affidavit) so he made up another earnings statement also showing $571,000, and gave it to Titan's board, and impliedly to me, and in this second statement (Ex. 5A, Kaufman affidavit), Faggen used different adjustments to reach the same total earnings. This statement is at best misleading; because Faggen never gave me the second presentation and until very recently I had never seen it. I was in California and I am informed that Faggen delivered it in New York only to Tony Frank (Titan's President) for presentation to the board, just before the board meeting in New York

on October 9, 1968 approving the deal that I had made with Faggen on October 2 (when I was in New York), based on the earlier $571,000 statement. I do not recall having seen this new presentation of earnings, expanded to show the four years of earnings in the $500,000 range, which were described to me orally when I made the deal with Faggen. I was informed in writing by Tony Frank that Faggen was preparing a letter "to present to the Board meeting on Wednesday" (Ex. 5C, Kaufman affidavit) and later that this presentation showed the $571,000 income for 1968 and dependable income near $500,000 for 1967 and 1966. But Faggen never gave me his revised presentation and never discussed it with me, and as Faggen recently stated to his friend, Chairman Robinson, he didn't explain to anyone else the new adjustments that yielded the same total he previously had given to me because "no one ever asked him to explain these differentials." (Ex. I, Frank affidavit).

4. The second set of adjustments, now revealed in detail for the first time in Faggen's affidavit and Appendix B are entirely new to me. Apart from

the legal effect of Faggen's silence when he changed the ground rules between the first and second presentations, there are at least three misleading statements in the recent explanation of the total earnings for four years used to induce board approval:

Investment income of $45,000 in 1968 was *excluded* from the $571,000 in adjusted earnings shown to me (Ex.4), but was then included in the $571,000 in adjusted earnings given to Titan's board, says Faggen (p. 20, Faggen affidavit and Appendix B). Moreover, investment income in that amount or higher was somehow added into each prior year to beef up their total earnings.

5. I state categorically: We were not buying Faggen's investment expertise. I did not intend Titan to, and would not suggest that it pay 20 times after-tax earnings (ten times pre-tax) for stock market speculation. I was interested only in his operating earnings. Thus the second set of figures adding up to $571,000 had an element that Faggen and I had already agreed upon as not being part of operating earnings, and not subject to the multiple being paid.

REPLY AFFIDAVIT OF EDMUND M. KAUFMAN

6. Faggen's own demand to me of ten times pre-tax earnings was "excluding investment income" (Ex. 3, Kaufman affidavit, my conference notes). Is he saying now we volunteered to pay more than he demanded? His own adjustments given to me at our two negotiating sessions expressly excluded investment income (Ex. 4, Kaufman affidavit); as shown, they were deducted from the earnings of each corporation in computing the adjusted $571,000 for 1968. To further show that investment income in Faggen's companies was irrelevant to us, I am informed that on February 12, 1969 (right after the closing in December, 1968), Faggen's board of directors, including Faggen himself, distributed all his securities of Titan for rapid liquidation, showing Titan's complete disinterest in his future stock market expertise. How then did these excluded earnings from stock market activities, in which Titan had no interest, then creep back into Faggen's calcuations? Was my refusal to pay for net worth as an independent factor to be negated by paying for the same item through the mechanism of a multiple of investment earnings?

REPLY AFFIDAVIT OF EDMUND M. KAUFMAN

7. They came back by concealment. To my knowledge Faggen gave only total earnings figures to the board and in his computations he now says he threw investment income back in and reached the same total. There was no discussion with me, no negotiation and no permission to him to do this. Not even Faggen says there was, and as negotiator and representative of certain principal shareholders of Titan at the time, I know I did not agree to such inclusion. As shown in President Frank's note to me on some slight changes (Ex. 5C, Kaufman affidavit) all substantive changes in the deal I made with Faggen would normally have been disclosed to me. Faggen's new witness McIntyre (who was shortly thereafter replaced as Titan's chief financial officer) concedes he was not a party to any of the business negotiations (par. 10, McIntyre affidavit). This concealed increment to earnings in nearly 10% for 1968 alone, and had even greater exaggerating effect on total earnings shown for the three prior years.

8. Moreover, McIntyre's erroneous memory aside, the board records shown to me (Ex. 5B, Kaufman affidavit) state that the pro-forma earnings statements

"excluded investment income," confirming the belief at the time within the board itself. I believe this notation on a definitive corporate record initialed by Chairman Robinson and showing delivery to President Frank was made on October 9, 1968 when the board met, and President Frank has expressly confirmed that he understood that the income for which we were paying ten times pre-tax earnings excluded investment income. It seems strange to me that Faggen confesses to this change of ground rules in his earnings totals five months after this case started, and that he was silent on them in his original moving papers.

9. The second misleading statement in Faggen's recent explanation is in the figure of "Various expenses $37,574," added into the selling memorandum for 1968. How can a mere guess as to future savings on expense accounts, "travel, entertainment, automobiles, etc." (p. 2, Faggen Appendix B) add up to a figure of precise as $37,574? And how could the same guess on the same items add up to $32,800 on the adjustments Faggen gave me (Ex. 4, Kaufman affidavit)? The $37,574 seems to me to be an entry to make the

numbers now come out right - $571,000 in total earnings. The recent explanation for the difference refined down to $5,006 (p. 6, Faggen Appendix B) is that Diebold "indicated that their controls would be less rigid than the controls which Titan could have exercised." We never even discussed such details at our two net-otiations! Mr. Faggen's explanations are a "balancing act" in every sense of the phrase.

10. The third misleading statement concerns the continuing concealment of any of the adjustments that went into the earnings figures for the three years before 1968. Faggen is noticeably silent on these, and the reason is obvious. If we take the $45,000 in investment income quietly thrown back into his figures, and $64,000 for alleged overpayments into the pension fund in 1968, there are $110,000 in increased earnings - i.e., $1,100,000 in notes paid Faggen - in these two items alone. But the pension fund had a continuing average cost of around $40,000 (See p. 13, Hatcher affidavit), so Faggen could not just add in the same $64,000 "over-payment" for 1968 in each of the three years. He is still silent on what he did with these figures over the whole period shown to the board.

11. A similar example is the add-on for salary savings. Faggen and Dogan, I am informed, did not earn as high a salary in 1965 through 1967 as they did in 1968. Did Faggen merely use the same upward adjustment to recognize future savings for all four past years? I am told Rose Dogan earned $49,500 in 1968, but only $41,900 in 1967, $36,900 in 1966 and $31,500 in 1965; Harold Faggen's salary was $87,700 in 1968, but $77,700 in 1967, $67,700 in 1966 and $64,300 in 1965. Did he add back into earnings anticipated future savings on salaries that he and his wife never received in the first place?

12. To me the ultimate issue is whether I had a right to rely on the truthfulness of a highly trained accountant-lawyer and whether Titan's board had the right to rely on his word, particularly with Chairman Robinson's vouching for him. Was it not his duty to disclose any questionable detail of the adjustments underlying his presentation of total earning power? I think the questions answer themselves. The differences on the face of the statement of $571,000 he gave me and the selling memorandum he gave the board

appear to be insubstantial; with his shuffling income between four closely-held corporations, the only thing that mattered was the bottom line - the total earnings presented. Mr. Faggen prepared a selling technique, of adjusting his earnings upward to multiply them and maximize his sale price; he used it on Diebold, he used it on me, and then without disclosing a change in methods of computation, he used it on Frank and Titan's board, all with the same attractive and false, picture of more than $550,000 in dependable earning power.

13. In order to complete the picture, I would like to refer to other comments made by Mr. Faggen in his affidavit and certain impressions and innuendo therein conveyed which should help give color to the situation as then existed and as now alleged.

14. Mr. Faggen states that experienced counsel never made the pro-forma statement a matter of contract (p. 2, par. 4, Faggen affidavit). Even a cursory examination of the financial representation and warranty which I included in my first draft of the basic agreement, as compared to that inserted after negotiated between counsel and agreed to by Mr. Robinson's office,

suggests differences which, at this late date, are difficult to explain. My draft indicated that financial statements for relevant periods would be represented. Counsel, without my participation and discussion, somehow converted this into a representation of income tax returns. I am an experienced attorney and am well aware of what a "pro-forma statement" is intended to represent. Although it is not a statement covering historical facts as they were then properly accounted for, it nonetheless was intended, and was received by me, as an expression of reality through translating statements prepared for a particular purpose (to minimize tax liability) into a meaningful statement of what the company's operations would amount to under generally accepted accounting principles, applied on a consistent basis. I do not believe that Mr. Faggen would allow the presentation of such a pro-forma statement to Titan's board of directors without understanding that approval by such board would in fact be based upon such pro-forma statement.

15. Mr. Faggen further suggests that Titan directed that the earnings of the Faggen companies be used to finance an expansion into a data processing business

which was not "previously conducted" by the Faggen companies (p. 4, par. 11, Faggen affidavit). It is my recollection that the Faggen companies were already embarked upon rendering data processing services to their clients. Further, based upon the pro-forma statement and oral comments made by Mr. Faggen, I was then of the belief that the represented earnings in excess of $550,000 were a solid indication of what was to be anticipated subject only to *minor* expenses and costs incurred in connection with expansion of the data processing activities. I believe that such expansion had already been largely committed to by Mr. Faggen and was carried on in a manner and fashion not fully disclosed to me or to any of the officers or directors of Titan.

16. Throughout his affidavit, Mr. Faggen suggests that he was open in permitting the free flow of information about the Faggen companies and operations to Titan's executives. For a period in excess of one year commencing shortly after the Faggen transaction closed, I was Chairman of the Board of Titan and am personally aware of the extraordinary amount of

difficulty I had in obtaining any significant information about what was going on in the Faggen operations. Mr. Faggen repeatedly refused to meet with my representatives, repeatedly refused to cooperate and even to discuss his detailed activities and future commitments.

(Sworn to by Edmund M. Kaufman, October 23, 1972.)

REPLY AFFIDAVIT OF ANTHONY M. FRANK IN SUPPORT OF PLAINTIFF'S MOTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,

County of New York, ss:

ANTHONY M. FRANK, being duly sworn, deposes and says:

1. I have reviewed the affidavit of my former employee, Richard K. McIntyre, submitted by Harold Faggen, whose affidavit I have also reviewed, and wish to set the record straight on a few crucial facts, as follows:

2. The selling memorandum presented to the Board of Directors of Titan, to which was annexed to pro forma statement of earnings for the four years preceding the acquisition, absolutely excluded investment income. I knew that Faggen had accumulated some securities in his companies, and I knew that these securities were traded, resulting in extraordinary income in dividends, interest and capital gains and losses, and was informed both by Mr. Kaufman, who negotiated with Faggen, and by Faggen himself that all earnings calculations,

upon which the price of the transaction was based, absolutely excluded investment income. This non-operational income was extraordinary, and Titan had no interest in buying Mr. Faggen's stock market expertise at a price of 20 times after-tax earnings therefrom (ten times pre-tax).

3. I further knew at the time of these negotiations that Faggen had supplied a set of adjustments to Kaufman of pro forma earning power of $571,000 in 1968 and that in his discussion with Kaufman, Faggen had excluded investment income from the pricing negotiations. I note that such exclusion was previously contained in Kaufman's notes of the conference, these notes are now confirmed by Faggen as being accurate, and the pro forma adjustments presented to Kaufman in his two negotiating sessions with Faggen, had specific negative adjustments in order to exclude investment income from the 1968 result of each corporation (see Exs. 3 and 4 of Kaufman Aff.).

4. After Kaufman told me he made a deal with Faggen at approximately ten times Faggen's adjusted 1968 earnings, I had several discussions with Faggen between October 2, 1969 and our Board meeting on

October 9, 1969 to review and approve the transaction. I asked Faggen to make up a presentation to the Board, with the earnings figures he presented to Kaufman expanded on a four-year basis, to demonstrate to the Board the regularity and dependability of earning power which Faggen had represented to Kaufman and to me. Mr. Faggen prepared the selling memorandum, which showed $571,000 in earnings in 1968, pursuant to this request.

5. When I received this memorandum from Mr. Faggen, (I do not recall whether it was typed up in the offices of Ben Robinson or in Titan's offices), I then discussed the earnings memorandum with Mr. Faggen. I definitely recall that investment income was excluded from the presentation. Such exclusion was written on the memorandum itself by me when I reviewed it. I asked Faggen if the memo excluded investment income, he told me it did and I wrote this on the memorandum; it is my handwriting! Our Company would never pay 20 times after-tax earnings for earnings on liquid assets not used by Faggen in his business. After all, we intended to liquidate these securities, and Faggen was so informed. McIntyre's

recollection of the memorandum not mentioning the exclusion of investment income is incorrect, because I discussed the point with Faggen and wrote it into the memo in October, 1968. I relied upon such memo as stating pro forma earnings only of an operational nature. Faggen's latest statement that in his calculations for the memorandum presented to me, he threw investment income back into the computations, is just not true. It is a complete surprise, and Faggen has changed his recollection of the components of the $571,000 in 1968 earnings represented to Titan.

6. After the Board approved this deal on October 9, 1969, I asked McIntyre to check over Faggen's accounts, and he made a limited examination. As McIntyre states, he did not participate in any of the discussions between Kaufman and Faggen, between Faggen and me or between Kaufman and me, wherein the economic substance of the deal was made. Mr. McIntyre's recollection of going over these detailed adjustments with me does not jibe with my recollection.

7. McIntyre concedes "I was not aware of every detail of some of the adjustments" for savings on "travel, entertainment and various other expenses,"

and he was equally unaware of the details on Faggen's other adjustments, as I was unaware. Faggen presented his four-year earnings figures as careful accounting presentations, presumably on a consistent basis in accordance with generally accepted accounting principles. According to Hatcher's audit, I now see that many of the adjustments are invalid, and that Faggen is unable or unwilling to provide the exact nature of the adjustments for each of the three years preceding 1968.

8. Mr. McIntyre's affidavit is vague on the precise adjustments for each of the four years, because neither of us were aware at the time what those exact adjustments were. Both of us trusted the total earnings figures presented to us by Mr. Faggen, the $571,000 figure for 1968 was the same one presented to Mr. Kaufman, our negotiator, and I discussed this figure with Kaufman, and neither McIntyre nor I had any reason to believe that Faggen had changed his methods of calculation between the pro forma presentation made to Kaufman and the pro forma presentation made to me and our Board.

9. On the cut in Rose Dogan's salary, I repeat my prior statement that Faggen informed me of this minutes

after the deal was closed, at the closing in Ben Robinson's office. I left the schedules to the lawyers, and did not know what her prior salary had been. This merely demonstrates further to me that Faggen alone knew the details of the adjustments he had used to build the earning power for four years which he presented to us, and that he played upon our lack of knowledge of the precise details, and of our Chairman Robinson's trust in him, to provide total exaggerated earnings figures.

10. After the acquisition, there was no indication of any misleading statements by Faggen, and no reason to audit his books for the four years preceding the acquisition. My recollection is that the only checking that was done by our accounting staff was for the period from September 30, 1968 forward, and while I was at Titan no one ever made inquiry into the four years preceding the acquisition.

(Sworn to by Anthony M. Frank, October 20, 1972.)

REPLY AFFIDAVIT OF DANIEL G. HATCHER IN SUPPORT OF PLAINTIFF'S MOTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,

County of New York, ss:

DANIEL G. HATCHER, being duly sworn, deposes and says:

1. As chief Financial Officer of Titan, and maker of an earlier affidavit herein, I have reviewed the recent affidavit of Richard K. McIntyre, who was Treasurer in 1968 and 1969, at the time the Faggen Companies were acquired.

2. Upon a close reading of Mr. McIntyre's affidavit, it is evident that neither he nor Faggen is contending that an audit of the books of the Faggen Companies was made for any period prior to September 30, 1968, and that, as stated in my prior affidavit, Titian only began to audit these books forward from September 30, 1968.

3. To reverify such fact, I asked my staff to make a search of old Titan files, all of the work papers of Mr. McIntyre and his subordinates (who

ultimately did the work back in late 1968), to make certain that no audit was done for any time frame before September 30, 1968. My review of such records, which were voluminous, included work papers and notes of the supervising accountant, Assistant Treasurer Russo, and other subordinate accountants at the time, and all such papers indicate that there was no audit of the Faggen Companies for the years, 1968, 1967, 1966 or 1965 at the time of the acquisition, and all audit work went forward from September 30, 1968 through December 31, 1968.

4. On reviewing Mr. McIntyre's file in our posession, which he did not have before him when he made his most recent affidavit, I found the following documents which contradict his statement in par. 14(a) of his affidavit that investment income was included in Faggen's four year presentation to Titan.

In Mr. McIntyre's own files, I found handwritten notes, stapled together, showing certain figures on the Faggen Companies, to which was stapled the pro-forma income presentation by Faggen for four years, which is the subject matter of this action, with the penned notation

"(Without Invest Income)." I further found in McIntyre's November, 1968 work papers a copy of the earlier set of adjustments given to negotiator Kaufman, (Ex. 4, Kaufman Aff.) also showing $571,000 in adjusted 1968 earnings.

Finally, I found another copy of the four-year pro-forma presentation of income from Faggen in Assistant Treasurer Russo's November, 1968 file of work papers, and that copy also showed the same phrase as Mr. McIntyre's showed in pen,"(Without Invest Income)." All of these documents are annexed as Exhibits 1 p. 3 shows "(Without Invest Income)," 2 and 3, and their clear exclusion of investment income is directly contrary to Mr. McIntyre's statements. The other argumentative statements by Mr. McIntyre in par. 14 of his affidavit as to "erroneous assumptions" are equally lacking in substance, as shown below and in the Kaufman, Frank and Russo replies herein.

5. The work papers of Titan's accountants at the time indicate that there were inquiries with Mr. Faggen as to certain receivables, verification of other balance sheet items, inquiry into his bookkeeping system and other general matters in order to establish beginning entries for the September 30 to December 31, 1968

stub period. There is no indication in these files of any attempt to examine or verify Faggen's claimed adjustments which increased his pre-tax earnings to $571,000 on the pro forma statement which were previously presented to Titan's negotiators.

6. There are no notations from Mr. McIntyre or any of the other accountants indicating verification of Faggen's proposed adjustments. These files appear to be most complete, and would presumably indicate if Faggen gave any written material in support of his proposed adjustments. I note from the McIntyre affidavit that Mr. McIntyre does not claim to have received any written explanation of the adjustments (except that given to Kaufman, which is in McIntyre's files), and does not claim to have received any oral explanations of adjustments other than for the year 1968. Mr. McIntyre is absolutely silent on knowledge of any adjustments for the three prior years. As stated, we found no evidence of any explanation given of the adjustments in the files.

To show how much in the dark McIntyre is, not having his files when he signed his affidavit, he says that $175,000 in treasury notes went to Titan at the closing (par 14(e), McIntyre Aff.). A memo that

went to McIntyre April 29, 1969 is annexed as Ex. 4, saying "All securities of all four corporations were transferred to Titan *with the exception of the U. S. Treasury Notes.*"

7. I note that McIntyre and Faggen do not controvert the statements of President Anthony Frank that Faggen would not permit a review of his books by the Peat, Marwick & Mitchell firm because they were competitors in the actuarial service field. A note in McIntyre's files confirms Faggen's refusal, saying "audit--PM [Peat, Marwick]--No!" (Ex. 5 attached). The records indicate that Peat, Marwick was willing to accept Faggen's figures for the last three months of 1968 solely because it was a short period of time, and any potential problems in their certifying the work of Faggen's personnel were assumed not to be material.

8. I note a reference in Mr. McIntyre's affidavit to a vacation pay accrual which appeared on the balance sheet of the Faggen Companies just before closing at about $59,000, wherein Faggen agreed to waive some $36,000 in accrued vacation pay. This $59,000 item was turned up in our audit of the Faggen Companies and while disclosed to Titan just prior to closing as a

balance sheet item, was not shown as a charge against income for the four years preceding the acquisition, and was not included on either the income tax returns of the Faggen Companies or on the two sets of upward income adjustments which Faggen provided to Titan's negotiating executives.

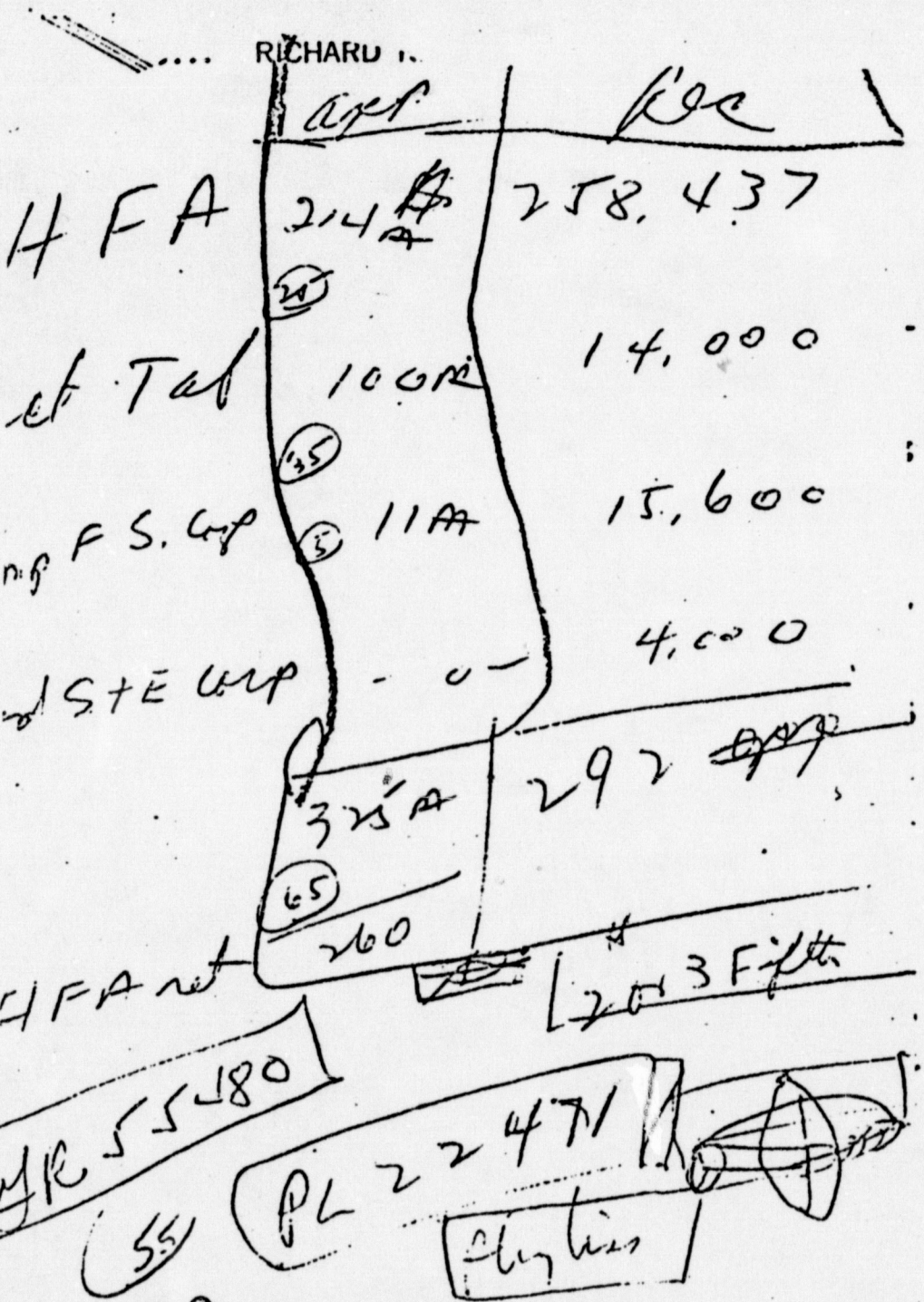
9. While Mr. McIntyre and Mr. Faggen seem to deal with an alleged refusal by Faggen's personnel to let us see their books and records for the period prior to September 30, 1968, the facts have not been correctly stated. These records were in Mr. Faggen's and his employees' possession prior to 1972, and so far as is known, no one in Titan asked to see them for the four earlier years, presumably because no one was suspicious of fraudulent inducement in the transaction. When we were instructed to make an audit for the period prior to September 30, 1968 and requested to see this material of Faggen and Joseph Warren (his accountant) early in 1972, Faggen refused to make the books and records available.

(Sworn to by Daniel G. Hatcher, October 25, 1972.)

EXHIBIT 1, ANNEXED TO REPLY AFFIDAVIT OF DANIEL B. HATCHER.

| | Net Worth Inc Profits after Tax (Per Rec'd) | Less (RP-P Fed tax calc) Cost | Plus Investment Increment | Adj Net Inc before State Franchise Tax |
|---|---|---|---|---|
| HFA | 1070 | 160 | 215 | 1125. |
| + TC | 294 | 24 | 100 | 370 |
| = FSC | 158 | 18 | 11 | 151 |
| = STC | 13 | 1 | -0 | 12 |
| | | | | 1,658 |

EXHIBIT 1, ANNEXED TO REPLY AFFIDAVIT OF DANIEL B. HATCHER




; In:

| | 1967 | 1968 |
|---|---|---|
| | $332,192 | $430,596 |
| | 59,201 | 65,806 |
| | 25,252 | 29,104 |
| | — | 10,476 |
| | 35,240 | 35,280 |
| | $451,885 | $571,262 |
| | 41( | 53( |

TITAN INDUSTRIES · INC·
529 FIFTH AVENUE · NEW YORK, N.Y. 10017
(212) MO 1-3232

EXHIBIT 1, ANNEXED TO REPLY AFFIDAVIT OF DANIEL B. HATCHER

(EXHIBIT A)

Net Income - Pre-Tax
Adjusted to basis which will
prevail after acquisition (without interest income)

| | Fiscal Years Ending In: | | | |
|---|---|---|---|---|
| | 1965 | 1966 | 1967 | 1968 |
| Harold Faggen Associates, Inc. (June 30) | $253,357 | $367,087 | $332,192 | $430,596 |
| Actuarial Tabulating Corp. (March 31) | 59,878 | 60,976 | 59,201 | 65,806 |
| Employee Fund Services Corp. (Sept. 30) | 32,767 | 27,891 | 25,252 | 29,104 |
| Fund S & E Corp. (June 30) | ——— | ——— | ——— | 10,476 |
| Harold Faggen, Personal (Dec. 31) | 34,800 | 34,800 | 35,240 | 35,280 |
| Totals | $380,802 | $490,754 | $451,885 | $571,262 |
| | 341 | 456 | 411 | 536 |

1549

EXHIBIT 2, ANNEXED TO REPLY AFFIDAVIT OF DANIEL B. HATCHER.

Adjustments

| | | | |
|---|---|---|---|
| Fed. Fgn. Tax Deduct Investment Income Balance | | | 288494<br>31905<br>256589 |
| Old Bad + Wst. & Co. Income Tax Total | | | 14820<br>271409 |
| Tax Allowance (Loan at 6/30/76) | | 25700 | |
| Pension Prepayment | | 58108 | |
| Chase A/C 12/31/76 (Can be treated loan) | | | |
| Rent | | 22950 | |
| Fee | | 13162 | |
| | | 119920 | 119920 |
| | | | 39329 |

EXHIBIT 2, ANNEXED TO REPLY AFFIDAVIT OF DANIEL B. HATCHER

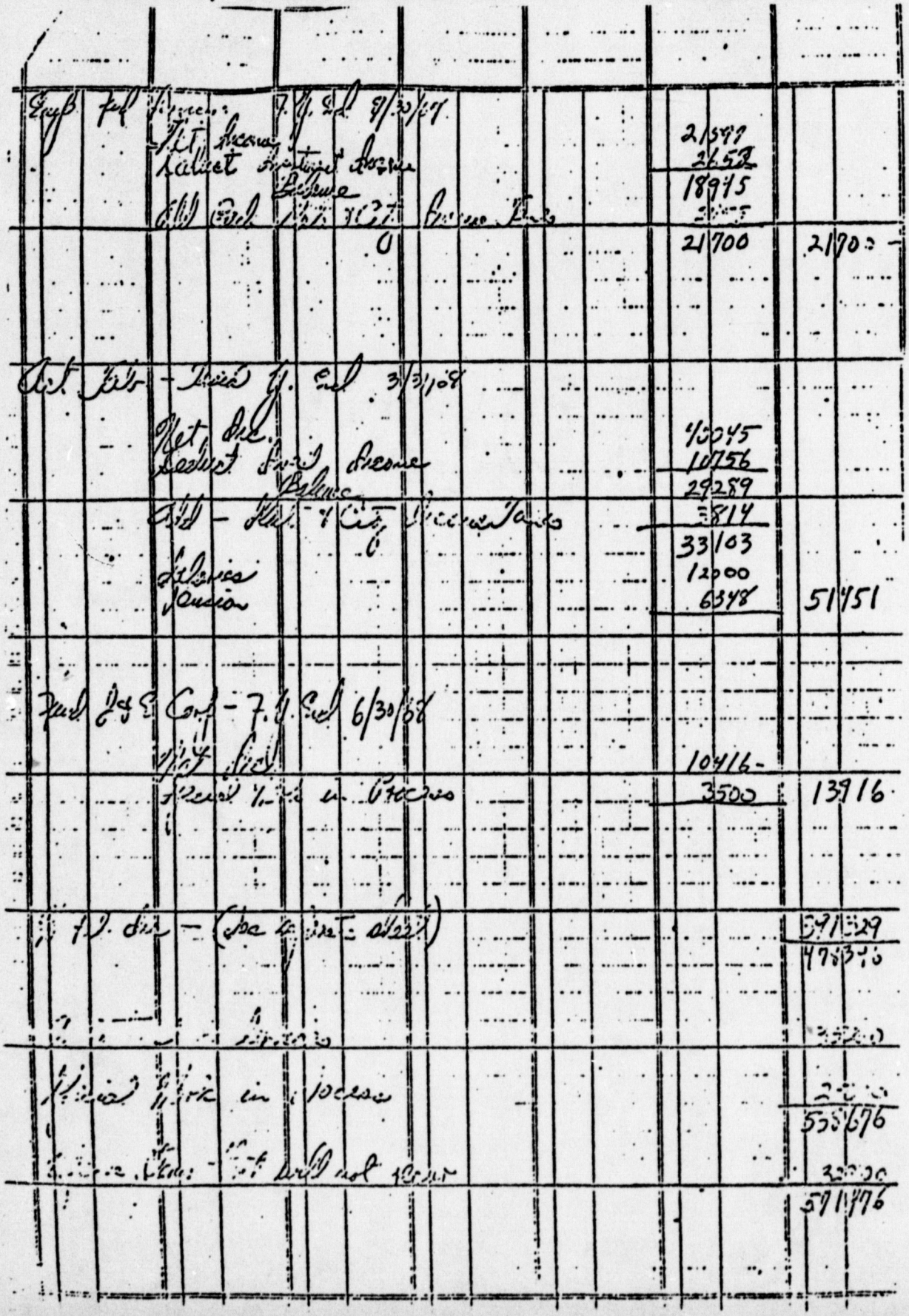


EXHIBIT 3, ANNEXED TO REPLY AFFIDAVIT OF DANIEL B. HATCHER.

(EXHIBIT A)

Net Income - Pre-Tax
Adjusted to basis which will prevail after acquisition (Litton Owned Income)

| | Fiscal Years Ending In: | | | |
|---|---|---|---|---|
| | 1965 | 1966 | 1967 | 1968 |
| Harold Faggen Associates, Inc. (June 30) | $253,357 | $367,087 | $332,192 | $430,596 |
| Actuarial Tabulating Corp. (March 31) | 59,878 | 60,976 | 59,201 | 65,806 |
| Employee Fund Services Corp. (Sept. 30) | 32,767 | 27,891 | 25,252 | 29,104 |
| Fund S & E Corp. (June 30) | — | — | — | 10,476 |
| Harold Faggen, Personal (Dec. 31) | 34,800 | 34,800 | 35,240 | 35,280 |
| Totals | $380,802 | $490,754 | $451,885 | $571,262 |

Per cent basis returns - 34% 45% 41% 53%

1549

34
34
35
35
139

EXHIBIT 4, ANNEXED TO REPLY AFFIDAVIT OF DANIEL B. HATCHER.

TITAN GROUP, INC.
620 FIFTH AVENUE, NEW YORK, N.Y. 10017 ☐ TELEPHONE (212) MO 1-0222

DATE April 29, 1969

TO: J. SPENCE, R. K. MC INTYRE -- cc: J. Levine, A. Mitchell, M. Hampson, M. Ros

FROM: J. V. RUSSO

SUBJECT:

We have prepared as of February 12, 1969 the appropriate journal entries to accomplish the following: 1) Liquidate Employee Fund Service Corp. and Actuarial Tab Corp.; 2) transfer the securities held by these two corporations to TGI; and 3) transfer to TGI by dividend the securities held by Harold Faggen Associates, Inc. and Fund S & E Corporation.

All securities of all four corporations were transferred to Titan with the exception of the U. S. Treasury notes. In all cases, the market value of the securities as of September 30, 1968 was used to record the securities on Titan's books since, in effect, this was Titan's true cost basis. The securities are in the possession of Titan and RKM is having them put in the name of Titan. The cut-off date (TGI vs. Faggen Corps.) as to the pick-up of dividend income on the above is February 12th With respect to interest income, for the sake of simplicity, any interest accrued at the date of transfer of bonds to Titan will, when collected, be recorded as income on the Faggen books.

It should be noted that the tax basis of the marketable securities in the hands of Titan will be different from the book basis. (Alex Mitchell will compute the tax basis.) The Federal Income tax accrual set-up by consolidation entry at the year-end on the basis of the difference between the September 30th market values of the securities and the cost basis thereof to Faggen has been incorporated into the journal entries recorded by TGI in picking up the securities. However, the accrual will have to be revised upon computation of the tax basis of the securities to TGI.

Attached is a schedule of the securities transferred. As noted above, the value on TGI's books represents the September 30th market value.

| | Value on TGI's Books | Cost to Faggen Co's |
|---|---|---|
| Harold Faggen Associates | $ 744,676.73 | 562,002.91 |
| Employee Fund Service Corporation | 70,851.32 | 66,566.00 |
| Actuarial Tabulating Corporation | 196,689.16 | 136,657.04 |
| Fund S & E Corporation | 6,962.50 | 6,770.73 |
| Total | $ 1,019,179.71 | 771,996.68 |

4

Close of Sign:
Jo Levine - Controller's Office
Robinson & Silverman
Louis Haase - Atty's agreement.

Difference between 196,689 & 265,665 on schedule of allocation of consolidated equity (attached to consolidating agreement)
Faggen sold Titan investments U.S. Treasury Notes not transferred.

EXHIBIT 5, ANNEXED TO REPLY AFFIDAVIT OF DANIEL B. HATCHER.

memo from... RICHARD K. McINTYRE

Harold

Accumulated earnings - [When are they taxed?

Acctg. withdrawal - Jan. financial, Pan. Orga.

Audit - P&L Not Allrco is ok

Safe deposit box / brokers - Hoggan has a couple

Ken Hoffman - Partner, Peat Marwick

UTAH INDUSTRIES INC
[illegible] AVENUE NEW YORK N Y 10017
(212) MO 1-3232

AFFIDAVIT OF J. VINCENT RUSSO IN SUPPORT OF PLAINTIFF'S MOTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,

County of New York, ss:

J. VINCENT RUSSO, being duly sworn, deposes and says:

1. During the period in which the subject matter of this lawsuit occurred, I was Assistant Treasurer and Controller of Titan Group, Inc. I am presently employed as Corporate Controller of Sky Chefs, Inc. in New York City.

2. A review of the books of the Faggen Companies was made under my supervision as of December 31, 1968, and also as of September 30, 1968 on behalf of Titan. My immediate superior was the Treasurer, Richard K. McIntyre, at the time, to whom I reported. I do not recall having made any audit or review for a period prior to such dates.

3. I was informed in or about October, 1968 that Titan was going to acquire the Faggen Companies. I had no contact with the business negotiations on the

pricing of the transaction. Essentially, I was informed that a deal had been made. It was my responsibility to handle the accounting. With respect to establishment of the pricing or any earnings figures furnished by Faggen, I have the vague recollection that I was informed that this was Ben Robinson's deal, and therefore I need not look into pricing or the figures aupplied by Faggen.

4. It is my recollection that I did not undertake any audit of the books and records of the Faggen Companies for the period prior to September 30, 1968, and that my activity was limited to inquiries made of Mr. Faggen in order to establish the opening entries for September 30, 1968 and the December 31, 1968 balance sheets.

5. I recall that Harold Faggen refused to permit Peat, Marwich, Mitchell & Co., a public accounting firm, to audit his books and records, because he stated that they were competitors in the actuarial service field.

6. Through May, 1969 (when I left Titan), I did not ask Harold Faggen to make available to us his books and records for the four years preceding the acquisition. With respect to my functions for periods after

the acquisition, my recollection is that Mr. Faggen was less than entirely cooperative and obtaining required information from him was occasionally quite difficult.

7. I have been requested by counsel for Titan to submit this affidavit, and Titan has agreed to compensate me at the rate of $200.00 per day for time spent in this matter. Because of work pressure in my present position, I have not had the time to review the Titan files which were made available to me and the statements made herein are to the best of my recollection, knowledge and belief.

(Sworn to by J. Vincent Russo, October 25, 1972.)

STATEMENT UNDER RULE 9(g) GENERAL RULES.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Plaintiff contends that there is no genuine issue to be tried as to the following material facts, in support of the plaintiff's cross-motion for summary judgment, and in opposition to defendant's motion for summary judgment.

1. Plaintiff entered into agreements to purchase all of the outstanding shares of stock in defendant's companies, in exchange for subordinated notes convertible into shares of plaintiff's stock, based upon two written reprsentations: (a) a written representation that defendant's aggregate earnings for 1968 were $571,000 (pre-tax), as adjusted by several items which, on a pro forma basis, could be deemed valid increments to pretax income, and (b) a written representation that defendant's pretax earnings for 1968 were $571,000, and pre-tax earnings for the year 1967 were $452,000; for 1966, $491,000, and for 1965, $381,000, based upon pro forma adjustments which constituted valid increments to pre-tax income during such four-year period, and the precise nature of such adjustments for the entire four years was not disclosed to the plaintiff.

STATEMENT UNDER RULE 9(g) GENERAL RULES.

2. The entire economics, i. e., price structure, of the transaction was based on the foregoing representations of regular and dependable earning power in excess of $550,000 pre-tax, which were then multiplied by a multiple of ten times, to result in $5,500,000 principal amount of subordinated convertible notes.

3. Plaintiff made no claim or demand to the effect that the foregoing written representations of earning power, as adjusted, were false and misleading until 1972, and did not conduct an audit of the Faggen Companies for the four years preceding acquisition as of December 2, 1968, having audited such companies only for the period after September 30, 1968.

4. The tax returns for the Faggen Companies, which were the only statements of income supplied to plaintiff for the four years prior to the acquisition, showed maximum earnings of $365,000 pre-tax (for 1968) and were far below the adjusted pre-tax income upon which the ten times multiple resulting in $5,500,000 in face value of corporate securities which plaintiff was induced to pay for acquisition of the stock of the Faggen Companies.

STATEMENT UNDER RULE 9(g) GENERAL RULES

5. The "statement of net income - pre-tax adjustment to basis which would prevail after acquisition" of the Faggen Companies, which is the four-year representation of pro forma earning power upon which plaintiff sues, was a precise pro forma representation of actual earning power for the four-year period contained therein, and purported to state valid and continuing adjustments to the reported taxable income which constituted genuine and continuing increments to the income otherwise shown for such four-year period, and such pro forma representation was not only a representation of past performance, but a representation of what could be reasonably expected from future performance of the Faggen Companies, giving effect to said presumably valid adjustments, i. e., continuing earnings in excess of $550,000 annually, after giving effect to said adjustments.

6. Plaintiff has used approximately $2,000,000 in liquid net worth and proceeds from the sale of assets and earnings from the sale of the companies since 1968 for proper corporate purposes of plaintiff, in the management of the assets of the Faggen Companies as wholly-

owned subsidiaries. Defendant has received approximately $1,100,000 in cash salaries, interest payments and other cash benefits to defendant and his wife since 1969, and has transferred $2.5 million principal amount of plaintiff's subordinated convertible notes to other persons, who are claiming to be holders in due course. Defendant, together with his wife, is currently drawing $113,000 in income from consulting fees and salaries from the Faggen Companies, together with automobiles, credit cards and other substantial employee benefits. Plaintiff, having paid $1,100,000 in cash to date to defendant and his wife, continuing to pay $113,000 annually in fees and salaries to them is exposed to claims of $2.5 million on the notes given to defendant, and plaintiff is, therefore, more than $1,600,000 behind on its transactions with defendant, with continuing substantial out-of-pocket expenses, after giving due regard to fair value of all assets received by plaintiff from these transactions.

7. Plaintiff does not deny paragraph 1 of defendant's statement under Rule 9(g), paragraph 2, or paragraph 3 (The income statements being limited

solely to tax returns), but plaintiff denies paragraphs 4, 5 and 6 of defendant's statement, and refers to plaintiff's statement of such material facts as hereinabove set forth.

ENDORSEMENT DENYING MOTION FOR SUMMARY JUDGMENT AND INJUNCTION DATED JANUARY 12, 1973 BY SYLVESTER J. RYAN, U.S.D.J.

TITAN GROUP, INC. v. HAROLD FAGGEN.

*Endorsement*

72 Civ. 1797

This motion for summary judgment is denied. After extensive oral argument, I have concluded that there are issues which must be decided at trial. I also have concluded that this case should be tried as soon as possible and thus, in accordance with the memorandum of December 20, 1972 from Judge Levet to Chief Judge Edelstein, I assign this case for trial to Judge Levet.

So ordered.

Dated: January 12, 1973.

SYLVESTER J. RYAN
United States District Judge.

MEMORANDUM OF JUDGE RICHARD H. LEVET.

*Memorandum*

UNITED STATES DISTRICT COURT.

Date: 12/20/72

To: Chief Judge David N. Edelstein

From: Judge Richard H. Levet

Subject:

Dear Chief Judge:

I would like to have assigned to me 25 civil jury cases now substantially ready for trial.

I assume that this can be done expeditiously since I am asking for one case from each of the Active Judges exclusive of the Chief Judge.

MEMORANDUM FROM SYLVESTER J. RYAN, U.S.D.J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Date: Jan. 12, 1973.

To: Judge Levet.

From: Sylvester J. Ryan

Subject: Titan Group, Inc. v. Harold Faggen.
72 Civ. 1797.

In accordance with your memorandum of December 20, 1972, I am sending you the above entitled action, which should be tried as soon as possible. I am attaching a copy of my endorsement of this date incorporating this reassignment.

S.J.R.

cc Chief Judge Edelstein.

DEFENDANT'S ORDER TO SHOW CAUSE FOR A REHEARING OF THE DENIAL OF THE MOTION FOR A PRELIMINARY INJUNCTION DATED JANUARY 29, 1973.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Upon the annexed affidavit of Harold Faggen, sworn to January 27, 1973, and upon all of the proceedings heretofore had herein, let the plaintiff show cause before the undersigned in Room 2203 of the U. S. Courthouse, Foley Square, New York, N. Y., on January 30, 1973, at 9:00 A. M., why defendant's motion for an order pursuant to Rule 65 FRCP directing that, *pendente lite*, plaintiff pay current interest installments on promissory notes should not be reheard, and upon such rehearing, why the Court should not enter an order directing the payment of such interest payments and for such other relief as may be just and proper.

Service of a copy of this order with the affidavit upon which it is made shall be deemed sufficient if served upon the attorneys for the plaintiff on or before January 29, 1973 at 1:00 P. M.

Dated: New York, N. Y.
January 29, 1973

s/ SYLVESTER J. RYAN
*U. S. D. J.*

AFFIDAVIT OF HAROLD FAGGEN IN SUPPORT OF DEFENDANT'S MOTION FOR REHEARING.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,

County of New York, ss:

HAROLD FAGGEN, being duly sworn, deposes and says:

1. I make this affidavit in support of a motion for a rehearing on the denial of my motion for a temporary injuction directing the plaintiff to pay the interest on 5.5 million dollars of notes on which plaintiff was in default and the collection of which was the basis of my action. The motion for a temporary injunction was coupled with a motion for summary judgment. Both motions were denied. The court, however, directed an early trial on the basis of what it heard on the oral argument.

2. On Friday, January 26th, in violation of a representation made to the court by the plaintiff that my wife and I would be continued as employees "*pendente lite*"*, we were discharged.

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*Page 26, plaintiff's reply memorandum. "EQUITABLE RELIEF MUST BE DENIED"* * *"Faggen and his wife are already being paid $113,000 per year as consultants, *pendente lite** * *" On the oral argument of the motion, held in Chambers, Mr. Frankel, president of the plaintiff, and I were present. The representation made in the reply memorandum was once again repeated to the court in response to the court's inquiry.

AFFIDAVIT OF HAROLD FAGGEN

3. The moving papers exhaustively analyzed my need for funds derived from the interest payments to meet current obligations as the basis for my application for the temporary injunction. The plaintiff's challenge to this application was its assertion that my wife and I were and would be employed *pendente lite*. Presumably, plaintiff's representations had a significant bearing on the denial of the motion for preliminary injunction since they were intended to represent that I had the assurance of sufficient income justifying the denial for injunctive relief. The plaintiff waited until the court decided the motion before violating its promise not to discharge us pending the outcome of this litigation.

4. My wife and I are now without any source of income. Plaintiff has now employed the last tactic of economic pressure to bring me to my knees. I cannot meet my present obligations under the circumstances which now confront me unless I receive the interest due to me on the notes.

5. A copy of the notice of discharge is annexed hereto and made a part hereof. None of the charges contained in this letter are ture; on the contrary,

since the argument of the motion I have been responsible for introducing substantial new business to the firm.*

6. Not content with discharging me and cutting me off from all income, plaintiff subjected me to the final act of humiliation. It directed plaintiff's employees to bar me from leaving the office on Friday afternoon, January 26th, with my private papers. They even went so far as to call in the police. An attorney from Mr. Cooper's office came to my assistance.

Wherefore, I respectfully request the motion for temporary injunction be reheard and upon rehearing that the plaintiff be directed to pay all interest accrued from November 1, 1971 to date, and further direct plaintiff to continue to make interest payments pending the trial of this action.

No previous application has been made for the relief requested herein.

(Sworn to by Harold Faggen, January 27, 1973.)

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*1. Negotiated Pension Plan for Amalgamated Lithographers of America.

2. Negotiated Unemployment Fund for Amalgamated Lithographers of America.

3. District 65 Retirement Trust for members of the NAWCAS Guild. Revenues when fully operative estimated between $40,000 and $60,000 per annum, net of expenses, from said clients.

EXHIBIT, ANNEXED TO AFFIDAVIT OF HAROLD FAGGEN.

TITAN GROUP, INC.

ROBERT JAMES FRANKEL
CHAIRMAN OF THE BOARD AND
CHIEF EXECUTIVE OFFICER

January 26th, 1973

Mr. Harold Faggen and
Mrs. Rose Dogan Faggen
c/o Titan Actuarial Services, Inc.
853 Broadway
New York, N.Y. 10003

Re: Our File RJF #185-201-6G

Dear Mr. & Mrs. Faggen:

When it was determined in mid-1972 to retain your association with Harold Faggen Associates, Inc. (now Titan Actuarial Services, Inc.), it was on the clear understanding that you would immediately institute action to train and develop our other Executives for the ultimate transfer of responsibility to them of certain clients then under your personal supervision. Despite this clear representation, information has come to our attention which indicates your attempt to subvert this program and to otherwise do harm to the operations of the Company.

Under the circumstances, your services are hereby terminated effective Friday, January 26th, 1973.

You are hereby directed to immediately return to the Company, all of its automobiles, credit cards, keys, equipment, corporate records, books, correspondence and other paraphernalia now in your possession.

Your actions in recent months to injure the business of this organization have been a serious violation of recognized business ethics, and have done irreparable injury to the Company for which we shall hold you personally responsible. Furthermore, we caution that any further activities on your part to ravage this Company will be the basis for immediate appropriate legal action to correct past wrongs and to prevent future harm by either of you.

Very truly yours,

TITAN GROUP, INC.

By: Robert James Frankel
Chairman of the Board and
Chief Executive Officer

RJF:ha

EAST 81, STATE HIGHWAY 4, PARAMUS, NEW JERSEY 07652 (201) 843-0040

PLAINTIFF'S NOTICE OF CROSS-MOTION TO AMEND COMPLAINT TO ADD ADDITIONAL CLAIMS FOR RELIEF.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Robert James Frankel, sworn to on February 2, 1973, and the exhibits annexed thereto, and upon all the papers and proceedings heretofore had herein, the plaintiff will make a cross motion before the Honorable Sylvester J. Ryan, United States District Judge, in Room 2203 of the United States Courthouse, Foley Square, New York, New York, on February 8, 1973 at 10:00 A.M. in the forenoon, for an order allowing plaintiff to amend his complaint to add additional claims to relief, and for such other and further relief as to this Court may seem just and proper.

Dated: February 2, 1973
New York, New York

Yours, etc.

POWERS AND GROSS
By LAWRENCE M. POWERS
Attorneys for Plaintiff

To:

SHEIB, SHATZKIN & COOPER

AFFIDAVIT OF ROBERT JAMES FRANKEL (1) IN OPPOSITION TO MOTION TO COMPEL *PENDENTE LITE* INTEREST PAYMENTS, AND (2) IN SUPPORT OF MOTION TO AMEND COMPLAINT TO ADD ADDITIONAL CLAIMS FOR RELIEF.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,

County of New York, ss:

ROBERT JAMES FRANKEL, being duly sworn, deposes and says:

1. I am Chairman of the Board of Titan Group, Inc. ("Titan"), plaintiff in this matter, and I make this affidavit. The factual matter contained herein is the product of personal interviews and investigations with several witnesses in recent weeks by counsel.

MOTION TO COMPEL INTEREST PAYMENTS

2. Defendant Faggen's motion improperly states that I, as Titan's chief executive officer, "represented" to the Court that Faggen and his wife would be kept on at $113,000 annual salary* indefinitely, while this case was readied for trial. Nothing could be further from the truth. No such "representa-

*Plus two Lincoln Mark III automobiles, expense allowances, vacation benefits, etc. - total benefits exceed $125,000 in actual value.

tions" was made nor was it implied. The fact of such cash flow to Faggen since his employment contract expired over a year ago, was mentioned in the motion papers and the argument, but no assurance was given or intended that his lucrative consulting arrangements would be continued indefinitely. They were a matter of sound business discretion to Titan, not an obligation, and when Faggen behaved improperly (as will be shown below), they were terminable at will. Faggen and his wife had no legal right to such arrangements, no contract in effect, and no foundation to demand $113,000 annually, except if they, in Titan's sole managerial judgment, made a contribution to the business worth such amount. Realizing that he has no legal right to $113,000 annually and that courts do not make and enforce employment contracts for people where none exists, and leave management judgments solely to management, Faggen shifts his ground to create a "representation" to the Court. For breach of the illusory representation, Faggen argues that he is entitled to damages in the form of a mandatory injunction to pay interest pendente lite, on his notes received for sale of the business. The representation of continuity that was never made has ripened into a promise to pay pending trial.

AFFIDAVIT OF ROBERT JAMES FRANKEL

3. In sum, Faggen wishes to create a new cause of action for contract damages - if you don't keep paying on a consulting arrangement, then you must pay interest by fiat of a court of equity. Merely to state such principle is to show its impropriety and inequity.

BASIS FOR DENIAL OF INTEREST PAYMENTS

4. Interest payments were denied to Faggen on his motion for a mandatory injunction because the rules of equity did not justify such relief, and not because he had an interim consulting arrangement. Faggen had received $1,100,000 cash, in interest and salary payments from Titan over 3-1/2 years and had, for valuable consideration in return, transferred $2.5 million in Titan's notes to alleged holders in due course, exposing Titan to irreparable injury totalling $3.5 million, as it sought to cancel the notes. Titan had received about $2 million in hard assets from acquiring the Faggen Companies, and it was already more than $1.5 million behind Faggen's benefits on the fraudulent transaction. The extra $113,000 in consulting fees received by Faggen and his wife over the past year since his employment contract expired, was merely extra damage to Titan, putting Faggen even further ahead of Titan in his transaction with them, raising

the net deficit to Titan from $1.5 million to $1.6 million. That deficit in favor of Faggen was not a vested right, and Faggen's argument is essentially that he should be able to increase Titan's deficit on the deal indefinitely at the rate of $113,000 per year in salaries or, alternatively, $220,000 per year in interest payments, pending trial. It is, to say the least, unusual for a wrongdoer in a major fraud case to claim a vested right to increase the victim's damages pending trial. Courts of equity attempt to maintain fundamental status quo, not to increase a good faith claimant's damages pending trial. And Titan's good faith and strong factual case have been demonstrated in the detailed documentation on the motion just decided.

5. In order to obtain equitable relief, particularly a mandatory "injunction" to compel pre-judgment interest while a case is pending, Faggen had to show substantial likelihood of ultimate success on his claims to $5,500,000, for a business that never even reached half of its represented earning power. The papers, and the detailed cross-motion by Titan, showed substantial likelihood that Titan would prevail, not Faggen. There was nearly enough on the record for summary judgment in favor of Titan.

AFFIDAVIT OF ROBERT JAMES FRANKEL

6. Equity also requires an inadequate remedy at law to justify such drastic relief as interest of $220,000 annually pending trial. But Titan is solvent and well able to satisfy any judgment Faggen obtains. The cases cited in our earlier briefs show how unusual it would be for a court to order interest paid on a contractual claim while a good faith dispute was pending. The motion was not well founded, even if Titan did not have a $1.6 million deficit in its transaction with Faggen, and the $113,000 in consulting fees were of minimal relevance to begin with, on the legal issue of a mandatory injunction to make interim interest payments. We note that Faggen does not admit to any impropriety in his claim that the whole $5.5 million is due and payable; presumably, his accelerating the whole amount of the notes is a contractual measure of relief which he was prompt to exercise and adequately protects his rights, together with interest running.

Faggen's claim of poverty as a justification for an injunction or an unearned salary payment are not only beside the point, they are false. He has boasted in my presence of his $1,000,000 art collection, he conducts a professional accounting practice, an art business, and he maintains a high standard of

living, the record shows $1,100,000 in interest and salary payments to date, and the main reason for terminating his consulting arrangement is his keeping some $450,000 in actuarial clients as his own - taking away some 45% of the gross revenues of the Faggen Companies he sold to Titan. Mr. Faggen, an accountant-lawyer and a well-known actuarial consultant, is not only eminently employable, he is in the midst of walking away with much of Titan's business.

REASONS FOR DISCHARGE

8. Faggen has been using the offices of the Faggen Companies to seal off his personal clientele in several major pension funds from any professional coutact with the other executives in the Faggen Companies. His group of clients, totaling some $450,000 in gross billings, were clients of the firm, but he has used the past year, on the firm's payroll, to make critical remarks about the staff he hired and trained in the Faggen Companies These negative comments have been related to employees repeatedly and are in general circulation in the trade.

Faggen told two funds that only he was qualified to hand their applications to the Internal Revenue Service, and that no other Faggen Companies employee could transact such business. He

asked one fund to demand that only Harold Faggen be allowed to service its account, to build up his own standing and tear down the business as a competent organization. Potential clients are reluctant to engage the Faggen Companies for fear that it will be liquidated, leaving their matters in a confused state. His affidavit speaks of obtaining new clients for the firm, but there is no indication that he will treat them other than as personal clients and take them with him, and no payments have been received from these alleged "new" accounts, even though some have been in house since 1971. There are no written retainer agreements with any of these so-called new clients, and all three are merely affiliates of existing clients under his control.

9. Faggen, for his $50,000 annual fee and $63,000 to his wife, was supposed to introduce other executives to the accounts he handled, bring them to trustee meetings, give them responsibility to deal with the clients, etc. to effect an orderly transference of these personal service clients to others in the organization, now that Faggen's employment contract had ended (December 31, 1971). These clients are the principal asset of the business that Titan has, concededly, paid over $3.6 million for to date (treating the notes held by alleged holders in due course as potentially payable). . But Faggen does not treat

these clients as the property of the Faggen Companies. He considers them his own and has openly announced his intention to violate his contractual covenants not to compete (which are still in effect), along with his wife. While asking the court to award him pendente lite interest, he and his wife are in the midst of walking away with the business that the interest is supposed to pay for. He who seeks equity should do equity.

10. The Faggen Companies operate in a specialized field - union pension and welfare funds. It is a closed society, where the key fund administrators and union executives meet regularly at conventions and meetings of their locals and internationals. One union relationship can equal five actuarial clients, because confidence and friendship with the source of the business automatically leads to handling all the affiliated funds. As the executives that Faggen trained and sold to Titan go about New York trying to obtain and hold business, Faggen's influential behind-the-scenes sabotage is destroying what is left of the business. That is why he was discharged.

11. I was present at the management meeting last Thursday evening where each executive, five of them in the Faggen Companies, expressed his views. They were all Faggen's "boys," he hired them, trained them and had worked with them for years, and for decades with one or two. Their opinion was unanimous

that he had set out to destroy them and their livelihood in his vindicative response to Titan's belief it had been swindled. As Chairman of the Board, I did not order Faggen's discharge to "bring him to his knees" as Faggen falsely charges; his own people demanded his discharge so they could make a living.

His conduct has been selfish and inequitable and the employees of the Faggen Companies did not want him undercutting them any longer. I speak from personal participation in the conference in describing the difficult managerial decision to let Faggen walk out the door with $450,000 in cash flow (the whole business only takes in $1,000,000 annually). Faggen's own employees were willing to lose half their business in order to preserve the balance from his depredations. We realized that the decision to keep him on last June was bad business, and while we were trying to preserve cash flow, he was working to take it away. Without Faggen, the executives felt they could survive and build on the clients they had personal relationships with. For Titan, there was only one decision possible - let the people running this subsidiary have sufficient freedom to keep the business alive their way. I and other Titan executives have no expertise in the difficult and technical field of actuarial consulting, and Faggen always kept his division a personal preserve.

Our only recourse was to let the several other executives there run the business - and run it their way, without Faggen's debilitating activities. Should several other people lose their jobs, and Titan's stockholders suffer, because Faggen is angry at being caught in the midst of a fraud?

Cross-Motion to Amend Complaint

12. Since the argument of the summary judgment motions in December, we have been investigating Faggen and his conduct closely, interviewing witnesses and obtaining documents we did not have previously. The case has taken a new, and shocking, twist which requires amendment of the complaint pursuant to Rule 15, F.R.C.P. (Exhibit 1, proposed amendment), in order to conduct adequate depositions and prepare for an early trial.

Conflict of Interest

13. Based on investigations to date, it appears that Faggen caused a substantial benefit to go to Titan's Chairman of the Board, Benjamin Robinson, in September, 1968 at the time of the acquisition of the Faggen Companies. The secret consideration, consisting of some $50,000 in annual retainer fees to Robinson, from a group of furniture workers pension funds, were apparently not disclosed to Titan by either Faggen or Robinson, Titan's

Chairman of the Board, although received concurrently with the acquisition negotiations in a patent conflict of interest. The corporate minutes do not reflect any such disclosure, there are no memoranda in the files of such disclosure and negotiator Kaufman was totally surprised at the revelation.

14. As the Court will recall from Kaufman's affidavit on the cross-motion for summary judgment (the calendar of events being substantially conceded by Faggen), Robinson strongly recommended the acquisition of the Faggen Companies in the summer of 1968. In August, Robinson told Titan's president Frank and its negotiator Kaufman that Faggen was ready to be acquired and would now show his earnings. Kaufman had his first negotiating session with Faggen on September 6, 1968 in Ben Robinson's law offices, and at Robinson's suggestion for setting up the meeting.

15. Robinson had told Titan's Board and Kaufman that he knew Faggen many years and that he was a great actuarial consultant. But he didn't tell Kaufman on September 6, that a few days before, on September 1, Faggen had engineered Robinson into being counsel for several related furniture pension funds for which Faggen had been actuarial consultant. Faggen did not disclose these facts either for obvious reasons, and as Titan's accountant Russo said in a prior affidavit, he did not try to audit Faggen's income in October 1968 before closing the acquisition

because "this was Ben Robinson's deal." The initial legal fees to Robinson were nearly $50,000 annually for the group of funds, and to date Robinson and his firm have received some $250,000 in fees since September, 1968 from this piece of business Faggen bequeathed to them in the midst of negotiations to acquire his companies.

16. I am informed that Faggen, as actuarial consultant, was working on this piece of business for Robinson through the summer of 1968, making critical comments about another lawyer employed by the furniture workers, until his discharge and replacement by Robinson was effectuated by Faggen. One of Robinson's first steps after being put in a personal relationship with the union people by Faggen, was apparently to get them to move their $13 million pension fund out of one bank and down to the Chase Manhattan Bank. It happens that a vice president of such Bank was also a director of Titan at the time, along with Robinson as Chairman of the Board. Thus Faggen had two good friends in court when his acquisition was under consideration at Titan in September-October, 1968. Robinson, in a clear conflict of interest with his law firm even handling the contracts for Titan and recommending Sheib as Faggen's lawyer, made no disclosure of the $50,000 annual "gift" just received from Faggen. More important, Faggen did not disclose this valuable consideration just conferred on Titan's Chairman.

AFFIDAVIT OF ROBERT JAMES FRANKEL

17. Robinson is a well-known lawyer, specializing, inter alia, in union pension fund administration. He and Faggen had sat together for years as advisers to the Amalgamated Lighographers Union funds, a major client group Faggen is now trying to take with him. The lucrative retainers conferred on Robinson almost on the day of Faggen's and Kaufman's negotiations, set up in Robinson's offices, was not disclosed by either Faggen or Robinson. A more glaring case of material omission by Faggen in violation of Rule 10b-5 or the common law could hardly be envisaged. If ever there was a duty to speak in a major securities transaction, it was when the Chairman of the Board and lawyer for the acquiror has just benefitted from a handsome cash benefit tendered to him by the acquiree. We won't burden the Court with all the cases holding concealed conflict of interest amounts to securities fraud.

Concealment of Dwindling Business

18. Annexed to Faggen's representations of earning power over four years (Ex. A to original complaint) is a list of new clients obtained each year. The list is materially misleading because it does not disclose all the clients Faggen lost in those years, and was about to lose. Moreover, the 143 clients were really clusters of clients, with 4 or 5 funds linked to a single union, and when the relationship was beclouded, several clients

were at risk of loss. We have recently learned from his former employees that in 1968 alone, the Faggen Companies lost some $100,000 (10%) of their gross revenues by clients terminating their services for various reasons, mostly relating to Faggen's arrogance, and seeming indifference to their needs. Mr. Faggen also had become too rich and successful to go to union conventions and fraternize with the "boys", in order to preserve the pool of clients he sold to Titan. Shortly after the acquisition in 1969 through 1971, several other prestigious and growing clients quit the Faggen Companies for similar reasons, and many of them had warned Faggen years before that he was too difficult to deal with, his opinions too pontifical, and that he was making enemies in the unions, and was risking loss of their business. We know of two reports by the Insurance Department of New York criticizing Faggen's handling of certain pension funds, which ultimately led to loss of these clients, with clear warnings of problems ahead before the sale to Titan, all undisclosed. The complaint requires amendment to complete discovery and proof on this item of misrepresentation as to a constantly "expanding" pool of clients, which, in fact, was shrinking.

AFFIDAVIT OF ROBERT JAMES FRANKEL

Other Misrepresentations

19. Faggen's memo was even misleading in stating that he started the business (p. 1, Ex. A to original complaint). In fact, the actuarial consulting business was started by David Ramsey, an old labor movement friend of Faggen's. We now know that Ramsey obtained the first key group of actuarial clients and serviced them for years. Faggen, an aggressive accountant-lawyer making his mark in New York City after World War II, became Ramsey's partner, then bought him out when Ramsey needed money. Ramsey then became a consultant, fronting for Faggen with many of the clients Ramsey had obtained. Ramsey thereafter became ill and was abruptly discharged by Faggen, dying shortly thereafter. Many old friends of Ramsey in the labor movement resented Faggen's cavalier treatment of Ramsey and his small gesture of amends to the widow. As a result, by 1968 when Faggen was projecting to Titan an unlimited future to a personal service business he had founded, he was in fact the ex-proprietor of someone else's client practice, with many enemies in labor circles where Faggen was dependent for future business.

20. Faggen's outline of the new clients to be obtained from his new line of computer services (p. 2, Ex. A to original complaint) was an illusion, with no hard facts to substantiate it. The program, we are now informed, was untried and far from perfected, and no genuine solicitation of business from stock-brokers, law firms or other such clients had yet been made in 1968, to support such representation. Needless to say, the computer programming services were never perfected, have been a complete loss since 1968, and have steadily eroded any profits in the actuarial consulting business purchased by Titan. Representations of new operations expected to be profitable, without an objective foundation, are a traditional Rule 10b-5 violation and common law fraud count, arising in securities transactions where a business is being sold.

Mismanagement Claim

21. In addition to the new misrepresentation counts to be added to the complaint, Faggen's mismanagement since the acquisition requires another count. Keeping clients for oneself, instead of treating them as assets of the business, bought and paid for by Titan, is a species of mismanagement that goes beyond the reasonable discretion given managers. Faggen has done this continuously since 1968 and is now taking nearly half the business for himself (as he pleads poverty to justify interest payments too)

Statements and actions calculated to ruin a business, and to hold its employees up to ridicule and loss of clients is also a form of fraudulent mismanagement, violating Faggen's duty of good faith transference of his business for the substantial payments made to date by Titan. Faggen has also shut-off accounts receivable, sent out artificial billings to induce Titan to believe the business was doing better than it was while he ran it (1970 through early 1972). We have found many accounts receivable where customers said Faggen always sent exaggerated bills, then renegotiated payment in subsequent years. All of this was calculated to mislead Titan into thinking the Faggen Companies were more profitable than they were after the acquisition. A cause of action for fraudulent corporate mismanagement, for which substantial salaries were paid and other damages suffered, is therefore set out in the proposed amendment to the complaint.

## Conclusion

22. Rule 15(a) F.R.C.P. mandates ease of amendment of a complaint to ensure all the facts and claims are tried in any controversy. See Foman v. Davis, 371 U.S. 178 (1962) Cooper v. Empire Insurance Company, 296 F.2d 203 (6th Cir. 1960), encouraging liberality in amendments where no prejudice or disadvantage

is suffered by the opposing party. Rule 15(a) says: "leave shall be freely given when justice requires" it. Discovery will be expedited by permitting prompt amendment of the complaint to cover the new facts which have come to light.

23. Faggen's attempt to re-open the decision denying him summary judgment and/or interest payments pending trial, should be denied for the compelling factual and legal reasons stated - (1) little likelihood of his ultimate success, (2) a balance of hardship still far too much in his favor with Titan suffering a $1.6 million deficit on the transaction and his taking away $450,000 in cash flow, and (3) an entirely adequate remedy at law available to him, should he ultimately prevail. See our prior briefs on these points of equity, and by cross reference, we have tried to spare the Court more papers on this motion.

(Sworn to by Robert James Frankel, February, 1973.)

PROPOSED FIRST AMENDMENT TO COMPLAINT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Plaintiff having filed its complaint May 2, 1972, and having obtained leave of court pursuant to Rule 15(a) of the F.R.C.P., does hereby amend its complaint by this First Amendment to Complaint, to the following extent:

THIRD CAUSE OF ACTION

26. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 17 of the First Cause of Action, as though incorporated in full herein.

27. The Selling Memorandum annexed as Exhibit A to the complaint is further false and misleading in that Exhibit B affixed to such memorandum contains the following "Analysis of Clients":

| | Pension Funds | Welfare Funds | Other | Total |
|---|---|---|---|---|
| "New in 1968 | 2 | | 2 | 4 |
| New in 1967 | 3 | 1 | 3 | 7 |
| New in 1966 | 5 | 1 | 1 | 7 |
| New in 1965 | | 1 | 1 | 2 |
| New in 1960-1964 | 19 | 14 | 2 | 35 |
| Began Prior to 1960 | 49 | 36 | 3 | 88 |
| Totals | 78 | 53 | 12 | 143" |

The memorandum states that: "As shown in Exhibit B, attached, there are 143 clients, most of which have been clients continuously for more than ten years."

28. Such representations were false and misleading and omitted material information, in that the Faggen Companies had lost several clients during the period covered by the quoted schedule of new clients, and the clients lost in such periods were substantial and material and were not disclosed to Titan. Moreover, clients were not unrelated, and loss of one union relationship meant loss of several clients and increased risk, all concealed.

29. Said schedule of new clients is further false and misleading, in that at the time of the transaction, Harold Faggen well knew that several clients included in the foregoing list were unhappy with the services of the Faggen Companies, were considering termination of the relationship, and directly or indirectly had indicated their displeasure to Harold Faggen and the tenuousness of their relationship with the Faggen Companies.

FOURTH CAUSE OF ACTION

30. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 17 of the First Cause of Action as though incorporated in full herein.

PROPOSED FIRST AMENDMENT TO COMPLAINT

31. The Selling Memorandum is further false and misleading in stating that: "Harold Faggen Associates, Inc. was organized in 1956 to take over the business started by Harold Faggen during the latter part of 1946."

32. Such business was, in fact, started by David Ramsey in or about 1946, who created the initial clients for the firm through his relationships in the labor movement and engaged defendant Faggen, who was then an accountant pursuing his career in New York City, to help service these initial accounts which Ramsey had established.

33. In or about 1956, defendant Faggen purchased Ramsey's interest in the company started by Ramsey and acquired ownership thereof, with Ramsey becoming an employee handling the several substantial accounts, which Ramsey had founded to commence the business.

34. In or about 1966, Ramsey was discharged and ultimately died, thereby leaving Faggen in complete control and ownership of the business. Ramsey had founded it and acted as a consultant through such date, with key client relationships started by Ramsey, not Faggen.

PROPOSED FIRST AMENDMENT TO COMPLAINT

FIFTH CAUSE OF ACTION

35. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 17 of the First Cause of Action as though incorporated in full herein.

36. The Selling Memorandum which is Exhibit A to the complaint, is further false and misleading in the following statement contained on page 2 thereof: "Since we have both actuarial and computer capacity, we are in the process of programming completely automated pension plan calculations for small and medium size employers. We expect to provide these services to stock brokers, accountants and lawyers only. The availability of packaged pension plan services at very reasonable prices will enable stock brokers to service the pension plans instead of leaving them for the insurance companies."

37. Such statement was false and misleading and contained a material omission, in that the program was only in an initial stage in September 1968, when the statement was made, and was not yet refined or workable on a practicable basis. Moreover, the services were never available at reasonable prices, the Faggen Companies having been criticized continuously by even actuarial clients that their computer programming and related services were too expensive. Such quoted statement was further false and

misleading in that there had been no definitive sales efforts or commitments obtained from stockbrokers, accountants or lawyers to take the service, such service being in an entirely formative and development stage, and there was no reasonable basis for the statements made indicating the ready salability and business value of the service.

SIXTH CAUSE OF ACTION

38. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 17 of the First Cause of Action as though incorporated in full herein.

39. Concurrently with the negotiations for the acquisition of the Faggen Companies conducted in September 1968, Harold Faggen had caused a substantial business opportunity to be conferred upon Benjamin Robinson, Chairman of the Board of Titan, without disclosure of the conferring of such benefits, and the inherent conflict of interest in Robinson negotiating for Titan to acquire the Faggen Companies at that time.

40. In the summer of 1968, Faggen, having had a long standing mutual relation with Benjamin Robinson, did cause several pension funds, for which Faggen was an actuarial consultant, to

terminate their relationship with their existing counsel, and replace him with the law firm of Benjamin Robinson. The transference of this legal business to the Robinson firm, which constituted aggregate annual fees of approximately $50,000, was effected as of September 1, 1968, through the efforts of defendant Faggen to obtain such lucrative legal business for Titan's Chairman of the Board, Robinson.

41. Faggen did not disclose the obtaining of payment of this substantial monetary consideration to Robinson resulting in gross legal fees since 1968 in excess of $250,000, failing to make such disclosure in the Selling Memorandum referred to above, or either orally or in writing to any of the executives or directors of Titan. Titan's Chairman of the Board, Robinson himself, did not make a disclosure of such benefits at the time either, and handled the legal documentation on the acquisition of the Faggen Companies, as well as preliminary negotiations, without disclosure of this conflict of interest and potential breach of fiduciary obligations to Titan. Titan is informed and believes that its executives and accountants did not audit the income performance of the Faggen Companies before the transaction, because they were informed "this was Ben Robinson's deal" and were induced

by the friendly consideration of Robinson for Faggen, and recognition of cash benefits received, to use less than complete care and precision, accepting Faggen's representations of earnings and future potential, and closing the transaction in reliance thereon.

42. All of the foregoing actions related in the six causes of actions set forth above, constitute violations of the Federal Securities Laws, as well as the Common Law of New York, all as set forth in paragraphs 12 and 13 of the complaint.

SEVENTH CAUSE OF ACTION

43. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 17 of the First Cause of Action as though incorporated in full herein, and adds Rose Dogan Faggen as a defendant, being the wife of defendant Faggen and a business associate.

44. Since the closing of the aforesaid acquisition of the Faggen Companies by plaintiff Titan, defendant Faggen has been in virtually sole control of the operations and business of the Faggen Companies. Defendant Faggen has abused his office as president and a consultant to the Faggen Companies, and violated his fiduciary duties thereto in the following material respects since 1968:

PROPOSED FIRST AMENDMENT TO COMPLAINT

(a) Faggen has kept key clients for himself and his wife instead of treating them as assets of the business, and has forestalled and prevented other employees of the Faggen Companies from establishing personal relationships with and servicing approximately $450,000 in major clients;

(b) Defendant Faggen has manipulated accounts receivable from clients, by sending excessive billings which were adjusted downward later in order to create the appearance of a profitable business activity in services being sold, when, in fact, revenues for the annual periods since 1968, were declining from several clients of the Faggen Companies;

(c) Defendant Faggen has undertaken his scheme to divert many substantial clients from the Faggen Companies to himself and his wife, in violation of restrictive covenants in his employment agreement entered into at the time of the acquisition of the Faggen Companies;

(d) Faggen has undertaken a course of conduct by criticizing existing executives and their ability to operate the Faggen Companies, in an attempt to demean the technical skills and services of existing employees, has caused delays in payments of fees owed the Faggen Companies, and has otherwise acted to impair and destroy the business of the Faggen Companies so that he could appropriate major clients to himself, in violation of fiduciary duties and specific covenants not to compete.

PROPOSED FIRST AMENDMENT TO COMPLAINT

(e) Faggen has spent excessive sums on an unperfected computer service business, concealed its repeatedly poor results and misapplied capital of the Faggen Companies through such concealment.

45. As a result of the foregoing acts of corporate mismanagement and fraud upon the corporation, defendant Faggen and his wife have damaged the corporation at least to the extent of $5 million during the years since plaintiff Titan acquired the Faggen Companies, and plaintiff is entitled to recover all such damages from defendant Faggen and his wife, in the event it is required to keep title to the Faggen Companies herein because of the denial of Titan's prayer for rescission.

46. Titan is entitled to preliminary and permanent injunctive relief against Faggen and his wife for, directly or indirectly, soliciting clients of the Faggen Companies for themselves.

All other allegations of the complaint and the prayer for relief remain as stated.

Dated: February 1, 1973

POWERS AND GROSS

By_____
Lawrence M. Powers
A Member of the Firm

REPLY AFFIDAVIT OF HAROLD FAGGEN.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,

County of New York, ss:

HAROLD FAGGEN, being duly sworn, deposes and says:

1. I submit this affidavit in support of defendant's motion for rehearing of the motion heard on November 20, 1972 for a mandatory injunction directing plaintiff to pay interest installments on its promissory notes during the pendency of this lawsuit. The basis of my request for the mandatory injunction was the notes issued plaintiff were prima facie valid and I depended upon the interest to meet current expenses, as well as contractual obligations, including alimony of $52,000 a year to my former wife and $40,000 a year plus interest to Franklin National Bank.

2. Plaintiff's affidavit by Mr. Frankel has been submitted not only in opposition to my motion for a rehearing, but also in support of a cross-motion to amend the complaint to add a new party, my wife. I have been informed that amendments to pleadings should be liberally permitted in the interest of justice. Notwithstanding the general principle, there is not a single charge of wrongdoing, either in Frankel's affidavit or

the proposed amended complaint, even in a conclusory form, with respect to my wife, I cannot see how it can serve the interests of justice to permit the plaintiff to add her as a defendant. I see plaintiff's attempt only as another crude tactic to attempt to wear me down. Therefore, in the absence of any allegation upon which a meritorious claim may be founded and in the interest of justice the motion to amend the complain to add my wife as a new defendant should be denied.

3. The instant motion is based solely on the fact that by plaintiff's conduct, circumstances have changed since the Court denied my original motion for a mandatory injunction to compel the plaintiff to pay me the interest on its $5,500,000 notes, on which it had defaulted. Prior to the Court's order of January 12, 1973 denying the motions for summary judgment and for a mandatory injunction, plaintiff had employed my wife and me at salaries totalling $113,000 a year. On the argument of the motion on which rehearing is sought, plaintiff argued that equitable relief should be denied because my wife and I were being employed "pendente lite". On the argument of the motion, the Court specifically inquired on the question of our employment and it was orally advised by both counsel for the

plaintiff and Mr. Frankel that our employment would continue pending the litigation. In a disingenuous distortion, plaintiff would make it appear that I am seeking the enforcement of an employment contract. That is not and never has been an issue. Mr. Frankel knows that I have never claimed that my wife or I have employment contracts. I leave it to the Court to determine whether plaintiff's statement in its brief- that I was being employed "pendente lite" - or its statements in response to the Court's question, constituted an "illusory representation" to the Court based upon which plaintiff urged the Court to deny my motion for a mandatory injunction.*

*"Realizing that he has no legal right to $113,000 annually and that courts do not make and enforce employment contracts for people where none exists, and leave management judgments solely to management, Faggen shifts his ground to create a 'representation' to the Court. For breach of the illusory representation, Faggen argues that he is entitled to damages in the form of a mandatory injunction to pay interest pendente lite, on his notes received for sale of the business. The representation of continuity that was never made ripened into a promise to pay pending trial." (Plaintiff's Affidavit, Page 2). (emphasis supplied)

How blithely Mr. Frankel denies the making of a representation which is contained in plaintiff's reply memorandum, totally ignoring the words contained in his memorandum to this Court:

> "Faggen and his wife are already being paid $113,000 per year as consultants pendente lite" (Reply Brief, Page 26)

But whether such representation was made or not, certainly the change in circumstances since the Court decided the motion warrants a reconsideration of the same. The plaintiff waited until the Court decided the motion before taking the action of discharging my wife and me. The Court now knows that I no longer have the means to meet my contractual obligations nor the necessary income to support my wife and myself

4. By coupling the answering affidavit on a motion for a rehearing of a denial of a mandatory injunction for interest payments pendente lite with an affidavit in support of a cross-motion for leave to amend a complaint, plaintiff obviously intends to influence the Court in its determination of the motion to rehear. I note first that the affidavit of Robert James Frankel, the Chairman of the Board of the plaintiff corporation, does not purport to be based upon Mr. Frankel's knowledge of the facts but is almost entirely based on statements allegedly made to him by others. I have been informed by my

counsel that the affidavit, to the extent that it is hearsay, should be stricken and should not be heard in opposition to my motion for preliminary injunction.*

*Examples of Hearsay in Frankel Affidavit

¶1 ... "The factual matter contained herein is the product of personal interviews and investigations with several witnesses in recent weeks by counsel."

-------this shows the taint of hearsay throughout.

¶ 8. "These negative comments have been related to employees repeatedly and are in general circulation in the trade."

"Faggen told two funds that only he was qualified..."

¶10. .."As the executives that Faggen trained and sold to Titan go about New York trying to obtain and hold business, Faggen's influential behind-the-scenes sabotage is destroying what is left of the business."

¶11. ..."[five executives in the Faggen Companies] expressed [their] views...Their opinion was unanimous that he had set out to destroy them..Faggen's own employees were willing to lose half their business in order to preserve the balance..."

¶14. "...Robinson strongly recommended the acquisition of Faggen Companies, etc."

¶15. "Robinson had told Titan's Board and Kaufman that he knew Faggen many years...etc."

¶16. "...a vice president of [Chase]..was a 'good friend[] ' in court [for Faggen]"

"...Robinson made no disclosure of [$50,000 'gift']."

¶18. "...We have recently learned from his former employees.. several other prestigious and growing clients quit Faggen Companies..We know of two reports..all undisclosed."

¶19. Allegations regarding Ramsey, a deceased, are all apparently based on hearsay.

REPLY AFFIDAVIT OF HAROLD FAGGEN

5. Much of what is contained in ¶4 of Mr. Frankel's affidavit is simply a rehash of what appeared in Titan's affidavits presented on the motions for summary judgment. No new facts are added. No new circumstances are described. Titan's computations on the motions for summary judgment were deliberately deceptive as are Titan's present computations. For example:

(a) Mr. Frankel states that I have received $1,100,000 in interest and salary payments from Titan in 3-1/2 years. In fact, I received approximately $660,000 in interest payments from Titan and, in addition, I have received approximately $175,000 in salary from Harold Faggen Associates, Inc., a Titan subsidiary, which Titan proposes to transfer back to me. As we have noted time and time again in this litigation, if Titan proposes to debit me for the $175,000 that Harold Faggen Associates, Inc. paid by way of salary, then the cash and securities which Titan received, approximately $2,300,000, must be correspondingly increased.

(b) Mr. Frankel avers that I have "transferred $2.5 million in Titan's notes to alleged holders in due course, exposing Titan to irreparable injury totalling $3.5 million,

as it sought to cancel the notes". The fact is that $1.5 million in notes has been transferred in escrow as collateral to secure an alimony obligation of $72,000 a year to my former wife; at the time of that transfer, Titan issued an estoppel letter. Another $1,000,000 in principal amount of Titan's notes is collateral with Franklin National Bank for a loan to me, the present balance of which is $180,000. Reference to notes in the hands of holders in due course is a spurious attempt to distract the Court. Titan has not and does not propose to pay these holders and if they did, as I pointed out in other affidavits, Titan would not be damaged. Mr. Frankel avers that "Titan had received about $2 million in hard assets from acquiring the Faggen Companies". The fact is that Titan has received in hard cash and marketable securities more than $2,300,000, most of which has been earning money for Titan for four years.

6. It must come as something of a revelation to the Court to learn that Mr. Frankel is possessed of occult powers of perception; for, while the Court expressed no opinion as to why plaintiff's motion for summary judgment was denied,

REPLY AFFIDAVIT OF HAROLD FAGGEN

Mr. Frankel tells us that "the papers, and the detailed cross-motion by Titan, showed substantial likelihood that Titan would prevail, not Faggen. There was nearly enough on the record for summary judgment in favor of Titan." (Plaintiff's Affidavit, ¶5, page 4).

7. At ¶6 of the affidavit, Mr. Frankel claims that I have boasted of my "$1,000,000 art collection". I do not believe that whatever art I own (which incidentally is worth substantially less than $250,000) must be sold so that I can support myself and meet my obligations pending litigation; particularly where, as here, this plaintiff, more than four years ago, executed negotiable promissory notes to me after an arm's length transaction and where it does not challenge a single representation or warranty in the comprehensive agreements. Mr. Frankel continues by stating that I conduct "a professional accounting practice". Mr. Frankel knows that all the accounting income that I have earned has been in connection with my employment by Harold Faggen Associates, Inc.; that I have turned over all such income to that Titan subsidiary, and that I have no separate accounting practice. Mr. Frankel states

that I conduct "an art business". This is out of the whole cloth because I have never sold a single work of art. The most vicious canard in ¶6 is the statement that "the main reason for terminating his [my] consulting arrangement is his keeping some $450,000 in actuarial clients as his own..." This charge is without foundation and is not supported by evidence. The fact is that Mr. Frankel unilaterally and without notice terminated the relationship and I have made no effort either before or since termination to take any business from Titan or its subsidiaries.

8. Similarly, in ¶8, Mr. Frankel indulges in name calling and conclusory hearsay statements, none of which bears any relationship to the truth. In the absence of any specifics by any person who has knowledge of the facts, I am informed by my counsel that I should not indulge in denying reckless, wilful and non-specific charges, but I affirmatively aver that I have done nothing to hurt any Titan subsidiaries, including Harold Faggen Associates, Inc.; that I have at all times attempted to retain for those subsidiaries the business that I had developed and to introduce new and profitable business to the company.

REPLY AFFIDAVIT OF HAROLD FAGGEN

9. In the guise of a cross-motion to amend the complaint, plaintiff has introduced additional scandalous hearsay, the intent of which is to defame me and to suggest improper conduct, without any evidence. Thus, at ¶¶13 to 16, on the basis of hearsay statements, Mr. Frankel is willing to charge Mr. Robinson with violating his obligation as a lawyer in order to gain another client, and an officer of the Chase Manhattan Bank of violating his fiduciary duty as a director in order to gain another investment account. One would think that Mr. Frankel would have some evidence to support these charges before recklessly making them. An indication of the lack of concern for truth with which Mr. Frankel's affidavit was drawn is the quotation from accountant Russo's affidavit. Mr. Frankel states (¶15) that Titan's accountant Russo said in a prior affidavit that he "did not try to audit Faggen's income in October 1968 before closing the acquisition because 'this was Ben Robinson's deal.'" Mr. Russo was less categorical. His exact words are: "I have the vague recollection that I was informed that this was Ben Robinson's deal, and therefore I need not look into pricing or the figures supplied by Faggen". (emphasis supplied). I unequivocally aver that I had no understanding, implicit or otherwise, with the Robinson firm.

REPLY AFFIDAVIT OF HAROLD FAGGEN

10. The other alleged misrepresentations have also been invented by the plaintiff. For example, the so-called loss of business cannot be squared with the fact that the annual gross income of the Faggen Companies increased substantially between the acquisition date and the time I was relieved of authority in June 1972.

11. The best illustration of plaintiff's cavalier attitude toward truth is reflected in Mr. Frankel's references to David Ramsey, who was my partner with respect to some clients during the period 1951 to 1954. I never bought Mr. Ramsey out; he became an employee because it was advantageous for him to do so. During the entire period that he was associated with me, he suffered from various serious ailments about which I feel it unnecessary to burden this Court. I need only state that Mr. Ramsey did not die in 1966, as alleged in the proposed amended complaint. He became totally disabled in 1959-1960 and died in 1962, more than six years before I sold my business to Titan. Of what conceivable relevance is Mr. Ramsey to this lawsuit?

12. Mr. Frankel also alleges that I made false representations with regard to the computer services which I had begun to develop prior to the acquisition. Again, he is

indulging in hearsay statements; again, his charges have no basis in fact. The memorandum which was presented to the Titan Board in October 1968 (Plaintiff's Exhibit 5) speaks for itself. It was not a part of the representations by which the business of the Faggen Companies were acquired; it was not considered material enough for Mr. Kaufman to include in his list of representations in the contract which he prepared; and there was no breach of any representation or warranty on my part.

13. Finally, without any specifics whatever, Mr. Frankel charges me with mismanagement. Again, it is impossible to reply to irresponsible, blunderbluss hearsay charges which have no basis in fact. I emphatically and categorically deny the charges.

14. If in the application of the principle of liberally permitting the amendment of pleadings the moving party is required to demonstrate the good faith of its application, then plaintiff's application for leave to amend should be denied. Its affidavit is larded with hearsay and conclusory statements and totally bereft of any facts. In addition to these elements, plaintiff's timing of its motion is further evidence of its bad

faith; the motion was brought on without proper notice [General Rule 9c(2)], and in response to a motion on an entirely different subject. In addition, I am informed by my counsel that plaintiff's reason for requesting an adjournment on the return date of the order to show cause was to enable it to furnish the Court with a responsive affidavit to my motion. As the Court can now observe, the response is largely hearsay.

I respectfully request that the motion for rehearing be granted and that upon such rehearing the Court grant a mandatory injunction directing plaintiff to make interest payments pendente lite pursuant to Rule 65 and, further, that the plaintiff's motion to amend its complaint be denied, or, in the alternative, be denied insofar as it seeks to add Rose Dogan Faggen as a defendant.

(Sworn to by Harold Faggen, February 7, 1973.)

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Notice is hereby given that defendant, Harold Faggen, hereby appeals to the United States Court of Appeals for the Second Circuit from the order entered in this action on January 12, 1973 denying defendant's motion pursuant to Rule 65 FRCP for a mandatory injunction directing, that, pendente lite, plaintiff pay current interest installments on its promissory notes in the aggregate principal amount of $5,500,000.

Dated: New York, N.Y.
February 9, 1973

Sheib, Shatzkin & Cooper

By _____
A Member of the Firm
Attorneys for Defendant
235 E. 42nd Street
New York, N. Y. 10017

TO:

POWERS & GROSS
Attorneys for Plaintiff
110 East 59th Street
New York, N. Y. 10022

ORDER TO SHOW CAUSE FOR A REHEARING.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Upon the annexed affidavit of Harold Faggen, sworn to January 27, 1973, and upon all of the proceedings heretofore had herein, let the plaintiff show cause before the undersigned in Room ~~2203~~ of the U. S. Courthouse, Foley Square, New York, N. Y., on ~~January 30, 1973, at 9:00 A.M.,~~ why defendant's motion for an order pursuant to Rule 65 FRCP directing that, *pendente lite*, plaintiff pay current interest installments on promissory notes should not be reheard, and upon such rehearing, why the Court should not enter an order directing the payment of such interest payments and for such other relief as may be just and proper.

Service of a copy of this order with the affidavit upon which it is made shall be deemed sufficient if served upon the attorneys for the plaintiff on or before January 29, 1973 at 1:00 P.M.

Dated: New York, N. Y.
January 29, 1973

SYLVESTER J. RYAN
U.S.D.J.

MEMORANDUM ENDORSED DENYING DEFENDANT'S MOTION FOR REHEARING FOR A PRELIMINARY INJUNCTION.

Defendant, by Order to Show Cause returnable before this Court on January 30, 1973 and postponed by stipulation of the parties until February 8, 1973, asks that this Court order under Rule 65, F.R.C.P., the payment of interest payments on 5.5 million dollars of notes on which plaintiff is in default and to rehear the motion for temporary injunction.

Defendant states that he and his wife were discharged on January 26, 1973 in violation of a representation made to the Court by plaintiff that they would be continued as employees "*pendente lite*". He alleges that the plaintiff told the Court that there was no need for the temporary injunction, which was denied by the Court, as defendant and his wife were receiving remuneration from the company and that they would be employed *pendente lite*. Defendant states: "Presumably, plaintiff's representations had a significant bearing on the denial of the motion for preliminary injunction since they were intended to represent that I had the assurance of sufficient income justifying the denial for injunctive relief. The plaintiff waited until the court decided the motion before violating its promise not to discharge us pending the outcome of this litigation."

MEMORANDUM ENDORSED DENYING DEFENDANT'S MOTION FOR REHEARING

Defendant states that he and his wife are now without a source of income.

I have reviewed the prior papers in this proceeding and those presently before me. I find no new facts presented that warrant my changing my decision of January 12, 1973.

Defendant's motion for a rehearing is denied; so ordered.

Dated: June 22, 1973.

SYLVESTER J. RYAN
U.S.D.J.